# SUPREME COURT OF THE UNITED STATES.

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ORIGINAL DOCKET—NO. 7.

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## EX PARTE: IN THE MATTER OF MARY B. PENROSE, COMPLAINANT,

VS.

## JOSEPH B. WILKINSON.

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ON PETITION FOR A PEREMPTORY MANDAMUS.

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## *Petition to Supreme Court U. S.*

To the Honorable the Justices of the Supreme Court of the United States:

The petition of Mary B. Penrose, who resides in Philadelphia, in the State of Pennsylvania, respectfully showeth:

That in the matter of your petitioner against Joseph B. Wilkinson, No. 2044, circuit court of the United States, fifth circuit and eastern district of Louisiana, the defendant, on the 13th of Dec'r, 1854, was held guilty of fraud in disposing of certain property purchased of petitioner, without executing in her favor a mortgage to secure her in the payment of the price thereof, in accordance with a promise previously made to that end. This fact appears by reference to the transcript of the record, pages 20, 21.

That on the 12th of June, 1855, a final decree in chancery was entered in the said cause, wherein defendant was condemned to pay to petitioner the sum of twelve thousand three hundred and forty-three $\frac{75}{100}$ dollars, with interest, at the rate of five per cent. per annum, till paid, and the costs of suit; "and in case of default, that the plaintiff have writs of execution therefor, or other compulsory process, as she may be advised." Record, p. 24.

That a writ of fieri facias was duly issued in said cause on the 6th of January, 1859, and on the 10th of the same month a demand was made of def't by the attorney for the pl'ff for the payment of the said amount, which was refused.

On the 27th of the same month an attachment was issued to take the defendant for contempt in disobeying the previous orders and process of the court, and the defendant taken into the custody of the marshal.

That on the 3d of February, 1859, the def't, in answer to the process under which he was held, made his affidavit, denying the contempt, and further stating that he had "surrendered to the marshal all the property and assets that he owns, in order to satisfy the said execution, issued in virtue of the said decree, so far as the same will go; they are of little or no value, and a list of the same is hereunto annexed, marked (A.)" Record, p. 58.

That the said list shows some personal effects, (Record, 36 and 41,) and were sold by the marshal for an amount scarcely sufficient to pay the expenses of the sale, with some other trifling costs. Record, p. 35.

That in order to make his surrender effectual, and to obtain thereby his discharge from custody, on the 3d of Feb., 1859, the

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On the 27th of the same month an attachment was issued to take the defendant for contempt in disobeying the previous orders and process of the court, and the defendant taken into the custody of the marshal.

That on the 3d of February, 1859, the def't, in answer to the process under which he was held, made his affidavit, denying the contempt, and further stating that he had "surrendered to the marshal all the property and assets that he owns, in order to satisfy the said execution, issued in virtue of the said decree, so far as the same will go; they are of little or no value, and a list of the same is hereunto annexed, marked (A.)" Record, p. 58.

That the said list shows some personal effects, (Record, 36 and 41,) and were sold by the marshal for an amount scarcely sufficient to pay the expenses of the sale, with some other trifling costs. Record, p. 35.

That in order to make his surrender effectual, and to obtain thereby his discharge from custody, on the 3d of Feb., 1859, the def't took the oath prescribed by the 2d sec. of the act of Congress of Jan'y 6th, 1800, for the relief of insolvent debtors, (Brightley's Dig., p. 438,) to wit:

"And now, affiant solemnly swears that, with the exception of the above property, surrendered as aforesaid to the marshal, he has no estate, real or personal, in possession, or remainder or reversion, other than necessary wearing apparel, and he has not, directly or indirectly, given, sold, leased, or otherwise conveyed to, or intrusted any person or persons with, all or any part of the estate, real or personal, whereof he has been the lawful owner and possessor, with any intent to secure the same, or to receive or expect any profit or advantage therefrom, or to defraud his creditors, or have caused or suffered to be done anything else whatsoever whereby any of his creditors may be defrauded." Record, 58.

That on the same day, and in the same instrument that contained the list of his personal effects, and after appending to that list an avowal that "this is all the property I am owner of," he proceeded to say, that "I now declare that my son, Joseph B. Wilkinson, jr., is the bona fide owner of the following real estate, situated in the city of New Orleans, State of Louisiana;" after which he gave the description of five lots, and as many brick stores, and added that three of the lots were subject to mortgages of $100,000, of which $57,000 had been paid. The def't then proceeded: "Should these properties sell for enough to pay all the incumbrances on them, by verbal agreement with Dr. Wilkinson, he is to pay me the surplus." Record, pp. 44, 45.

Your petitioner showeth that although the def't made no surrender of said real estate, nor any interest therein, yet the son viewing it as a surrender, immediately claimed ownership and possession, and forbid the marshal from levying on the said "houses and lots" under the penalty of "such damages as the law may allow." Record, p. 43.

Upon the filing of the defendant's affidavit and application for a surrender, his counsel obtained an order of reference to a master on the "matter and charge of contempt," and "to make an inquiry and examination into the true state of the property and affairs of the said Wilkinson." Record, 53.

That the facts established before the master were—

1st. That the defendant had exchanged the property he purchased of the complainant in St. Louis, for the real estate described in his schedule, in New Orleans, giving the former as a cash payment, and assuming some mortgages on the latter. That the title to the New Orleans property was taken in the name of his son, Joseph B. Wilkinson, jr., with a verbal agreement to convey to defendant upon his release of the former from the liabilities he had assumed on that property. The value of this property so purchased in the name of the son was $64,000, and the value of the property in St. Louis, that was put in as a cash payment, was $30,146 28. Ans. to 1st interrogatory, Record, 62 to 65.

2d. That def't sold the property in St. Louis, which he had purchased of petitioner, for $96,866 28, (Record, 66, 67,) with the proceeds of which he purchased the said property in New Orleans, in the name of his son, and paid some debts. Record, 68 to 70.

3d. That defendant had created an apparent lien upon the said New Orleans property, of $46,770 $\frac{17}{100}$, by the "acknowledgment" of a judgment to that amount, in favor of Payne & Harrison, when in reality he was entitled to a release from the whole of that judgment by paying to the estate of Geo W. Johnson some $3,000. Record, 56 and 42.

Petitioner showeth that notwithstanding these facts, the master reported that the defendant had "surrendered to the marshal all the property and assets that he owns," and that he had taken the oath prescribed by law, for the relief of persons imprisoned for debt. Record, 57.

That exceptions were taken to this report, in which it was charged that def't had defrauded your petitioner by confessing a judgment to Payne & Harrison for an amount much greater than was really due; and in omitting to make a surrender of all the property belonging to him, as shown by his own admissions. It was further charged that the affidavit made by defendant to the effect that he had not conveyed any portion of his property "with any intent to secure" the same for himself, was not true. Record, 78 to 81.

That after argument, the exceptions were disregarded by the court, the report of the master confirmed, and the defendant discharged from arrest and imprisonment. Rec., 84.

That an application for rehearing (Rec., p. 90) was discharged, (Rec., 92,) on Saturday, the 23d of April, 1859, two days before the commencement of the April term of the circuit court, notwithstanding the objection of counsel, that the rehearing had been set down for the first day of the said April term, "by the order and with the approval of the district judge, with the express view of having the aid of the presiding judge." Record, 88.

Petitioner showeth that she applied for a new order of attachment, (Rec., 85,) which was refused by the court. Rec., 92.

That the course pursued by the court in discharging the defendant from arrest, and refusing to order new process for contempt, or to recommit the def't, is believed to be in violation of the statutes of the United States, and of the rights of your petitioner.

That by the laws of the State of Louisiana, a debtor is not entitled to the benefit of the insolvent laws, when he commits a fraud in the contract from which he seeks relief. Montesquieu vs. Heil, 4 La. R. 52.

That by the said laws, a "conveyance or transfer, or mortgage or pledge" of the debtor's property, to the prejudice of his creditors, is deemed a fraud, and for which he is liable to imprisonment for three years, on civil process of commitment, (4 Rob. R. 345; 15 La. R. 557,) unless he shall sooner pay the debt of the complaining creditor. Act of March 28, 1840, Bullard and Curry's Dig., p. 474, sec's 10 and 13. Acts of 1855, p. 435, sec's 19, 20, 21 and 24.

That by the 7th section of the act of Congress of Jan'y 6th, 1800, (Brightly's Dig., p. 439,) the benefit of which is claimed by the def't, it is provided that, "in case any false oath or affirmation be so taken by the debtor, the court, upon the motion of the creditor, shall recommit the debtor to the prison from which he was liberated, there to be detained for the said debt, in the same manner as if such oath or affirmation had not been taken."

Petitioner now further showeth, that she has been greatly wronged for many years by the defendant's refusal to pay the debt allowed by the said decree; and when she believed that he would be compelled to give up the property which had long been placed beyond her reach, for the purpose of satisfying her just claims, the action of the circuit court has, as she conceives, illegally deprived her of that remedy. That unless this court interpose in a summary manner, a delay of two or three years will ensue before the matter can be examined on appeal, and the casualties of life, to which the def't is subject, may deprive her altogether of the advantage of the process of the court to which she believes herself entitled.

Wherefore your petitioner humbly prayeth, that your honors would be pleased to order that a writ of mandamus, in due form, be at once issued from this court, returnable to the first Friday of the next term thereof, commanding and requiring the Honorable Theo. H. McCaleb, holding the circuit court of the said district, to cause the decree, so as aforesaid rendered on the 12th day of June, 1855, to be at once carried into execution, by reinstating the said attachment, and the recommitment of the defendant to prison; or on failure thereof, to show to this court, on the said return day, why the same has not been done.

And in support of this petition, your petitioner refers to the transcript hereinbefore mentioned, and will ever pray, &c.

MARY B. PENROSE. F. PERIN,
*For Petitioner.*

**United States of America,**

**Circuit Court of the United States, fifth circuit and eastern district of Louisiana.**

*Transcript of Proceedings of Attachment in the case of Mary B. Penrose vs. Joseph B. Wilkinson, No.* 2,044.

*Opinion of the Court.*—Delivered 13th November, 1854.

Circuit Court of the U. S., eastern district of Louisiana.

Mary B. Penrose
vs.
Joseph B. Wilkinson.

The bill is filed by the plaintiff with the object of rescinding a contract made with the defendant, for the sale and conveyance of a share in a tract of land in St. Louis, Missouri, and for compensation for various losses she had sustained as a consequence of the contract. The plaintiff in November, 1845, was equally interested with the devisees of her sister Anna Penrose, in a claim to a tract of land in St. Louis, under a Spanish grant, originally issued to Benito Vasquez, for 800 arpens, and which had been acquired by their father and by him, conveyed in 1823 to them. The grant had been laid before the various officers of the U. S. appointed to examine inchoate land claims in Missouri, and was confirmed by act of Congress to the sisters in 1836. It had been reduced to 344 acres by conflicting titles and sales, and this remainder was in the possession of adverse tenants, who claimed under the location of a New Madrid certificate in 1818, at the date of the confirmation.

The brother of the plaintiff shortly after the confirmation sought the opinion of eminent counsel at St. Louis in 1836, in reference to the title, and altho' opinions of counsel were given in 1839. These opinions exhibit clearly the question it involved, and were favorable to the validity of the title. Suits were commenced for the sisters in 1840, and prosecuted until 1843, when non-suits were taken from a want of preparation. In 1844 other suits were commenced in the circuit court of the U. S. at St. Louis, and were pending in November, 1845. The contract complained of was made at this time.

A deed signed by the plaintiff and defendant in presence of two witnesses, contained the terms of the contract. The plaintiff, by the words "grant, bargain, sell and convey," transfers her estate to the defendant. The defendant covenants to pay six thousand dollars, in two annual instalments, after he shall have recovered possession of the land; 5 per cent. per annum in semi-annual instalments on that sum from the date of the contract; to prosecute at his own cost and charge the suit for the land in all the courts necessary to ascertain the validity of the title; to discharge his claim for the costs and charges he had previously sustained about the suits, and that the contract should be secured by a special lien on the land conveyed. The principal sum was payable upon a contingency. The other sums were to be paid without a claim for reimbursement. The interest was to cease when the failure of the title became apparent.

The defendant paid the first instalment of interest at the date of the contract, and has paid all due till November, 1850.

The ejectment suit was tried at St. Louis, in April, 1846, and resulted favorably to the plaintiffs, and that judgment was affirmed in the Supreme Court of the U. S., at the December term, 1849, and is reported in 8th Howard S. C. R., 317. After the judgment in April, 1846, the defendant through Mr. Goode, the active attorney in the case, proposed to the plaintiff to execute another deed, absolute in its terms, with a more complete description of the lands, and omitting the covenants of the former deed, and that the consideration should be advanced to twelve thousand dollars, payable in one, two, and three years, after recovery of possession; six thousand to bear interest as before, to be secured by mortgage. This proposition was accepted, and the plaintiff in October, 1846, complied, by executing such a deed as was required, which was placed upon record in St. Louis, Missouri. The defendant acquired the possession of the land in 1850, and during that year, or since, has conveyed his entire interest for about the sum of $100,000, and without having executed the mortgage.

The bill of the pl'ff avers, that she was ignorant of all the matters affecting the validity of her title; that she was in necessitous circumstances, dependent upon her own labor and the kindness of friends for a support; that in this condition, by professions of regard, the defendant induced her to become an inmate of his family, to submit to him the conduct of her business, the selection of her counsel, and to rely upon his kindness, advice and assistance. That by these means he ascertained that her claim was indubitable; that the property involved was of immense value; and that this information he concealed from her.

The pl'ff proceeds to state, that in January, 1846, the deed was executed; that, at this time the defendant sent for her to come to his room, and in a tone of intimidation told her that she could not leave the room until she had executed a deed to him for her lands in Missouri.

That at first she refused, but finally yielded to fear, importunity, and the influence of members of the family.

The deed of the October following is also attached for fraudulent concealment and misrepresentation.

The answer is explicit in its denial of the statements and charges of the bill, and thus a direct issue is formed.

The evidence shows that these litigants are second cousins, that their parents were friends and intimate associates, and that a son of the defendant had married a sister of the plaintiff.

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The two sisters (Mary and Anna Penrose) had been under the care of their brother, (the son-in-law of the defendant,) and thus the intimacy which originated between their parents was continued between the two families after their death. For several years prior to the date of this contract, the plaintiff had been an inmate in the family of the defendant, and so far as appears from the evidence had been treated with kindness and attention; she is described to be a maiden lady, above fifty years, of intelligence, but of a romantic, nervous, sensitive disposition, somewhat eccentric, with no experience of the world, and wholly unaccustomed to the management of business. Her circumstances, in reference to property, had always been straitened, and at this time she had no claim to any save to this parcel of land in St. Louis. It does not appear that she had suffered want, but her friends, the family of the defendant, and a brother in Pennsylvania, had supplied her, if not liberally, at least sufficiently. The evidence does not sustain the allegation that she labored for her support, or suffered inquietude in regard to her maintainance.

Nor is it true that she was ignorant of all the matters affecting the validity of her title. Her title was one that had engaged the thoughts and cares of her family for a long period. Her brother in 1836 had obtained the opinion of Mr. Geyer, and in 1839 the joint opinion of Messrs. Geyer and Lawless, upon it. The information acquired by the brother and these opinions had been communicated to another brother, himself an experienced and educated lawyer. The opinions had been seen by the plaintiff, and her counsel, Mr. Goode, testifies that she had full information upon the subject of her case and of his opinion, that success would follow from its prosecution.

Nor does it appear that the defendant by artful professions of regard had secured her sojourn in his house, control over her business, selection of her counsel, and exclusive information of the nature of her suit.

The plaintiff had become an inmate of his family upon the death of her mother and brother, and had continued there for several years. During this time their intercourse had been friendly; she had required advice and aid, and whenever a masculine agency was necessary in her suit she had employed his; this is not denied. But it is proved that she exerted control, and carried on correspondence in reference to her suit, and there is no reason to infer concealment of any material fact from her knowledge.

The bill charges the contract to have been executed the 16th January, 1846. The date is the 7th November, 1845, and two papers executed at the same time, one of which comes from the custody of the plaintiff, bear the same date. The plaintiff remained in the south several weeks after this, and upon her arrival at the north, wrote to the defendant and his wife in terms of strong affection; she refers to the contract in these letters, and seeks to avail herself of its stipulations. There was then no complaint of it. The charges in the bill, relative to the execution of the deed, of the intimidation, importunity, fear and influence, are wholly unsubstantiated.

Now it is true, that there are transactions in which there is so great an inequality between the contracting parties, so much of habitual exercise of power on the one side, and habitual submission on the other, that without any proof of the exercise of control beyond what is apparent in the transaction itself, the court of chancery will impute undue influence. These are generally cases where there is some natural or legal relation between the parties; where there are none such, and when the relief sought is not licensed by any fact of habitual or occasional influence, there must be proof of some advantage, acquired by the use of some threat, undue practice or persuasion.

In Hunter vs. Atkins, Cook, Ch. C., 464, Lord Brougham says: "Where the known and defined relation of attorney and client, guardian and ward, trustee and cestui que trust, exists, the conduct of the party benefited must be such as to sever the connection, and to place him in the same circumstances in which a mere stranger would have stood, giving him no advantage, save only whatever kindness or favor may have arisen out of the connection; and that when the only relation between the parties is that of friendly habits, or habitual reliance on advice and assistance, accompanied with partial employment in doing some sort of business, care must be taken that no undue advantage shall be made of the influence thus acquired." The fact to be ascertained is, whether the contract is an independent and spontaneous act, or is the result of the practice of a "knowing or crafty counsellor," upon a less knowing or wary dupe or victim.

In the present case there was inequality between these parties. The plaintiff, from the want of worldly experience, could not, with the aid of the written opinions of her attorneys, or their assurances, appreciate the strength of her title, or estimate the duration, expense, vexation and peril of the controversy. She could not test the market for herself, to know the chances of sale, and she could illy afford to sustain in person the difficulties and embarrassments of the litigation. The evidence shows she labored under mental excitement at the date of the contract, in consequence of some real or supposed grievance, which determined her to leave the family of the defendant, though without any complaint or censure of him. She needed money to meet the expendit*ion* necessary. The deed was executed at the defendant's house, and it does not appear that she had any independent advice. No copy or other evidence of the defendant's obligations was given to her, and the price was in a great disproportion to the value of the land, and was for the most part conditional and contingent.

A contract between parties so situated for a litigated interest of an uncertain value, but which she esteemed so highly as to form of it, in the language of the answer, the "pet idea of her mind," and on which so many hopes, calculations and visions were based, for a price precarious, contingent and unequal, is one into which the court, upon established principles, is required to examine, to ascertain whether it was the voluntary and intelligent act of the party, or superinduced by any fraud or artifice.

Before entering upon this inquiry it is proper to dispose of the objection raised to the deed itself. My opinion is, that the deed is valid as a conveyance of land. The consideration, besides the amount contingent upon the recovery, provides for a semi-annual payment of a stated sum by way of interest, for the payment of costs and fees of counsel, and for a release of a claim for moneys already expended. It may be questioned whether a pecuniary consideration is necessary to raise a use by the statute of Missouri. Their statute executes a use whether raised by "bargain, sale, feoffment, covenant, contract, agreement, will or otherwise, by any manner or means."

Rev. Stat. Misso., ch. 32, secs. 1, 2, 3, 4. But the common law authorities maintain the sufficiency of the consideration expressed in this deed. Dyer, 337; Moor, 570.

Nor do I consider that the contract can be avoided for champerty or maintainance. The State of Missouri, in 1816, adopted the common law of England, and the statutes prior to 4th James, and not inconsistent with the written law of that State. The principle of the common law is, that no right of entry shall be the subject of a grant or assignment, otherwise that pretented titles might be transferred to great men, and right and justice trodden down and the weak oppressed. Co. Litt., 214.

The pretended titles, of which there could be no transfer, were such, for which the state of the possession rendered a suit necessary. Property in the adverse possession of another could not be sold, for the title of him out of possession is a pretended title. Plowden, 88. The court of chancery in England maintains the spirit of these principles by discountenancing "the merchandising in grounds," "huckstering in litigious discord," or traffic in uncertain and doubtful titles subject to controversy, and especially where the agreement is to divide the subject, or to sustain the expenses of litigation. Cockell vs. Taylor, 15 Bear, 103; 6 Hare, 336; 1 De G., M. & G., 660; 1 C. B. R., 717.

But it must be observed in the sale of pretended titles, both parties to the contract violate the law. And in the present case the defendant had the possesion under an executed contract, and of a portion of the land under a judgment recovered in his own name. Chancery would not interfere between such parties. Poor vs. Horton, 15 Borb., 485; 2 Hill, 526; 5 Hill, 273; 7 Ohio R., 71; 2 B. & A., 370; 8 Leigh, 510.

But the statute of Missouri authorizes "any person claiming title to any real estate, notwithstanding there may be an adverse possession thereof, to sell and convey his interest therein in the same manner and effect as if he was in the actual possession thereof." Rev. Stat., ch. 32, § 4.

The inquiry will now be made into the effect of the facts existing in the case, and whether the plaintiff is entitled to any, and to what relief. The bill presents a case of direct artifice, intimidation, importunity, unconscionable advantage; these are charged as the motives for the interposition of the court. These charges are not supported by the evidence. The question is, does this impose the necessity for dismissing the bill?

In Price vs. Berrington, 7 L. & Eq. R., 254, the Lord Chancellor declares: "That it is now an established doctrine of this court, that when the bill sets up a case of actual fraud, and makes that the ground of the prayer for relief, the plaintiff is not entitled to a decree by establishing some one or more of the facts quite independent of the fraud, but which might of themselves create a case under a totally distinct head of equity from that which would be applicable to the case originally stated."

The chancellor cites the cases of Wilde and wife vs. Gibson, 1 H. L. Ca., 605, and Ferraby vs. Hobson, 2 Phil. R., 255, which do not state the rules so extensively; and the cases of McGuire vs. O'Reilly, 3 Jo. and Lat., 224, and Glascote vs. Long, 2 Phil., 310, where a rule similar is mentioned, yet a different one was applied. Lord Cottenham, in Archibald vs. Commissioners, 2 H. L. Cas., 440, 460, explains the case of Glascott vs. Long, 2 Phil., 310, above cited, to apply to cases where all the considerations depend upon the fact of the fraud. But he says: "If fraud be imputed and other matters are alleged which will give the court jurisdiction as the foundation of a decree, then the proper course is to dismiss so much of the bill as is not proved, and to give so much relief as under the circumstances the plaintiff may be entitled to." The case of Eyre vs. Potter, 15 Howard, S. C. R., 42, which employs the rule of Lord Truro, in Price vs. Berrigton, may be understood with this qualification, and the practice of that court in Cathcart vs. Robinson, 5 Peters, 265, accords with this rule.

Our examination of the facts has conducted us through the winter of 1845–'6, during which the relatives of the plaintiff and the defendant seemed to have been amicable, and the expressions in the letters of the pl'ff affectionate and grateful. In 1846 the trial of the case of Penrose vs. Bissell in the circuit court at St. Louis took place. The pl'ff about this time visited her brother, C. B. Penrose, in Lancaster, Pennsylvania, who has been examined as a witness in the cause.

After the trial, the defendant communicates the favorable issue, and the suggestion of Mr. Goode that another deed should be executed, and his reasons for it. He says: "To this I have no objection, leaving the subject entirely to him, except that I have directed him, if a new deed is made, to enter the real consideration which I mean to give or pay you on the recovery of the property, viz. $12,000—$6,000 bearing interest as before, payable in one, two, and three years after recovery of possession—and will to-morrow execute a power of attorney to him to secure the payments, by giving you a mortgage on all the lands conveyed by you to me. The above I do as an act of justice." Goode, about the same time, acquaints her of his success, his confidence, his estimate of the value of the land, and proceeds to say that the deed of November is valid, has been duly acknowledged, and that he shall thereafter bring the new suits in the name of the defendant, Wilkinson. He proposes that she shall execute a new deed, which shall not refer to an earlier sale, which he supposes may be impeached, or contain the covenants and agreements between the parties, but shall be simple and absolute. He states his instructions in reference to the increase of the consideration and mortgage to secure it, and that he has a power of attorney for that purpose. Goode had been acting under a contract with the plaintiff in the management of the case, and had corresponded with her. These letters were laid before Mr. C. B. Penrose, and after a correspondence of near six months, and the execution of three deeds before one with a satisfactory probate was made, the deed of the 29th October, 1846, was sent to Goode and recorded in St. Louis. The deed of November, 1845, had not then been recorded. The judgment recovered in St. Louis was in the name and subject to the control of the plaintiff.

Wilkinson in these letters refers to expenses for counsel that had been incurred, and of the additional payments he might be required to make on that account. Many of the leading facts in the contract are expressed or referred to in the letters, and information is given that the deed of November has been seen, and is perhaps within the control of her counsel, and that he regards it as an operative and binding contract, and shall use it for the benefit of the defendant—or rather, he asks for a deed in addition, which shall be thus used.

I have decided that on the face of it the deed of November is valid, and I am not prepared to say that the acknowledgment and probate were invalid under the Missouri statute, (Rev. Stat., ch. 32, § 41, 42,) but registration was not essential to the operation of the deed. The reasons for the execution of the new deed may not be conclusive, nor the legal opinions of Mr. Goode strictly accurate, but I do not consider that of great consequence. The reasons for his preference for a new deed do not seem to be mere pretexts to obtain a confirmatory conveyance. The new deed was not sought for as a confirmation. But if there had been in the procurement of the deed of November, 1845, duress, artifice, or undue influence; if the pl'ff was at that time ignorant of her title, or of authoritative decisions affecting her title, or of the value of the property, or under an overruling necessity to perform the act, all those conditions had now determined. She was now under the roof of her brother, remote from the ascendant influence of the defendant or his family. Her brother was an attorney, well acquainted with the strength of her title, and capable of appreciating all the circumstances connected with the prosecution of her suit. He was well acquainted with the relations between the litigants in this cause and of the consequences attached to such relations; he knew her capacity, her weakness. The letters placed before him, with but little explanation, afford evidence of the contract that his sister had made. They show that her attorney in St. Louis had examined the contract, and was about to act upon it as a binding contract, and perhaps had it in his possession. He knew that the defendant relied upon it; was advancing money and expending time in order to profit from it. He knew the plaintiff was called to furnish the most authentic and irrevocable evidence that its validity was not impugned. I do not consider the excuse for the action which then took place, that he was not advised of the precise terms of the deed, as sufficient, for by ordinary diligence that knowledge could have been acquired.

Mason vs. Waring, 15 Beav., 151.

The duty of both the plaintiff and her brother at this time was to declare in plain and unequivocal language the decision to resist the contract, if there was any purpose to do so upon any ground then affecting its validity.

De Montmorency vs. Devereaux, 7 Clark and Fin., 188.

No complaint was made during the correspondence before referred to.

The suit was not decided in the Supreme Court for above three years from this time. The defendant during this procured counsel to argue the cause in the Supreme Court, and regularly paid the instalments of interest. In May, 1850, he was let into the possession of the land under the judgment of Penrose vs. Bissell, and other judgments in his own favor. In July of that year he paid to the defendant $3,000 in his notes for the first instalment, and paid her the interest then accruing. We have no evidence of complaint or objection till after this period. The doctrine of carrying equities by acquiescence, says Lord Cottenham, I consider to be one of the most important to be attended to, for otherwise there is great danger of the principles of a court of equity thus improperly exercised producing great injustice; a man, who with full knowledge of his case does not complain, but deals with his opponent as if he had no case against him, builds up from day to day a wall of protection for such opponent which will probably defeat any future attack upon him.

Vigus vs. Pike, 8 C. and F. 562.

My opinion is that the plaintiff is not entitled to a rescision of the contract. All the facts of the case are before me, and I shall proceed to determine the equities which the plaintiff has established. The deed of November, 1845, contained a lien upon the land to secure the payment of the sums the defendant agreed to *for*, and the continuance of that lien was distinctly submitted, as a term of the contract of which the deed of October, 1846, formed a part. Goode was instructed to make a mortgage in favor of the plaintiff, and those instructions were submitted to the plaintiff. Her attorney advised him that a mortgage was expected, and notified him to whom to remit it. The instructions to Goode were "for a mortgage" from the defendant to "Mary B. Penrose, securing the payment of $12,000 on the property conveyed by her, payable in one, two, and three years after the recovery and possession of the property—six thousand bearing an interest of five per cent. per annum, payable half-yearly, as mentioned in our contract." The deed of 1845, which embodied all the terms of the contract, never was recorded, and consequently its lien was inoperative as to purchasers. The mortgage contemplated in 1846 Goode did not execute, and he testifies that he subsequently advised Wilkinson that it was of no consequence, and to dispense with it. Wilkinson, shortly after his recovery in 1850, effected a partition of the property, and sold his entire estate for the large price before mentioned, and now insists he was under no obligation to make the mortgage, and Goode says he was not bound to fulfil his letter of attorney. I do not take the same view of the conduct of either of these parties. The duty of Goode was to execute the mortgage upon the receipt of the deed from the plaintiff, and it was an obligation he had contracted to her, and the transfer of the property by the defendant, so as to defeat the claim of the plaintiff to the promised security, was a fraud. I have had much difficulty with this fact in this case; I have had to consider whether the obliquity apparent here may not have been disclosed in the first contract. But upon a consideration of the testimony, I have not been able to reach the conclusion that the omission to execute this mortgage was only the consummation of a connected and well contrived scheme of fraud, of which the contracts of 1845 and 1846 were component parts, but that it was a separate act, originating perhaps in inattention or neglect, and having at first no fraudulent purpose. But the omission was a breach of duty to the pl'ff on the part of Wilkinson and Goode, for which she is entitled to redress. I shall consider the failure on the part of the defendant as entitling the plaintiff to demand immediate payment of the purchase-money, and shall allow interest from the date of the defendant's sales. C. C., 2,050, 2,051.

The case shows that the defendant, to gain possession of portions of the land, surrendered the claims of the pl'ff to the mesne profits. Wherever that was the case, the plaintiff is entitled to indemnity. The defendant contracted to prosecute the suits for the recovery of the plaintiff's claim, without cost or charge to her, and his use of one part of that claim, which she had not conveyed, in order to secure to himself that which she had conveyed, is contrary to its spirit of the contract.

The prayer of the bill in its present form will not authorize me to give any relief; but if the plaintiff will amend the prayer so as to ask either for the rescision of the contract, or if that is refused, then for the payment of the money due to the plaintiff, according to its terms and the facts of the bill and amendment, I am authorized to allow, upon the authority of Butler vs. Sparrow, 3 Jones and Lat., 694. I will cause a decree to be entered, in accordance with the views expressed in this opinion; otherwise the bill must be dismissed, but without prejudice to the plaintiff's rights upon the contract, and without costs.

### *Decree.*—Filed 5th June, 1855.

MARY BEDDLE PENROSE }
vs. }
JOSEPH B. WILKINSON. }

This cause came on to be heard on the master's report and for a final order.

No objection having been filed to the master's report, it stands confirmed. It is ordered and decreed that the defendant pay to the plaintiff twelve thousand three hundred and forty-three $\frac{75}{100}$ dollars, with interest at the rate of five per cent. per annum from the 16th of April, 1855, till paid, and the costs of suit, and in case of default, that the plaintiff have writs of execution therefor, or other compulsory process, as she may be advised.

(Signed) J. A. CAMPBELL,
*Ass. Just. Sup. C. U. S.*

### *Judgment Docket.*

Circuit Court of the United States, fifth circuit and eastern district of Louisiana—April Term, A. D. 1855.

New Orleans, Tuesday, 12th June, A. D. 1855.

Court was opened pursuant to adjournment. Present, Hon. T. H. McCaleb, district judge.

The following decree was received from Hon. J. A. Campbell, presiding judge, and ordered to be entered:

MARY B. PENROSE
vs. } 2,044.
JOSEPH B. WILKINSON.

This cause came on to be heard on the master's report, and for a final order. No objection having been filed to the master's report, it stands confirmed.

It is ordered and decreed that the defendant pay to the plaintiff twelve thousand three hundred and forty-three dollars and seventy-five cents, (\$12,343 $\frac{75}{100}$,) with interest at the rate of five per cent. per annum from 16th of April, 1855, until paid, and the costs of suit; and in case of default, that the plaintiffs have writs of execution therefor, or other compulsory process, as she may be advised.

Decree rendered 12th June, 1855.

Decree signed 20th June, 1855.

(Signed) JOHN A. CAMPBELL,
*Associate Justice of Supreme Court U. S.*

*Petition for Attachment.*—Filed 27th Jan'y, 1859.

To the honorable the Judges of the Circuit Court of the United States, fifth circuit and eastern district of Louisiana, in chancery sitting:

In the matter of Mary B. Penrose vs. Joseph B Wilkinson, No. 2,044.

The petition of the said Mary B. Penrose respectfully shows, that on the 12th day of June, 1855, she obtained a decree against the said Wilkinson for the sum of twelve thousand three hundred and forty-three dollars seventy-five cents, (\$12,343 75,) with certain interest and the costs of suit, and in the said decree your honors ordered that she may have execution therefor, "or other process, as she may be advised." That, on the 6th of January, 1859, she caused execution to be issued against the said defendant, which was on the same day presented to the defendant by a deputy marshal of the United States for said district, and a demand made for the money or property to satisfy the said writ, and that said defendant refused to comply with said request.

That, on the 10th day of January, 1859, your petitioner, through F. Perin, her attorney duly appointed, called on the said defendant, exhibited his powers of attorney and made a personal demand for the payment and satisfaction of the said decree, when he, the said defendant, wholly refused to pay the same or any part thereof, and that he now stands in contempt of the process of this honorable court.

That the only mode of compelling obedience to the said order is by process of attachment.

Wherefore petitioner prays that an attachment may issue and such other and further proceedings in execution of the said decree as your honors shall seem meet. He further prays that the annexed copies of affidavits, powers of attorney, and writ of execution be made part hereof, and for general relief.

(Signed) F. PERIN,
*For Compl't.*

*F. Perin's Affidavit, annexed to foregoing Petition.*

MARY B. PENROSE
vs.
JOSEPH B. WILKINSON.
No. 2,044. In Chancery.

Circuit Court of the United States, fifth circuit and eastern district of Louisiana.

Be it remembered, that on this the eleventh day of January, A. D. eighteen hundred and fifty-nine, before me, J. W. Gurley, a commissioner of the United States, and clerk of the said court, personally came and appeared Franklin Perin, who first being duly sworn by me to state the truth, did depose and say:

I am the attorney of the complainant in the above entitled cause, constituted by written power from complainant to Davis & Birney, of the 20th of December, A. D. 1858, and from Davis & Birney to myself, of same date, which powers are hereunto annexed for reference.

On the 6th day of January, A. D. 1859, I caused execution to be issued by the clerk of said court against the said defendant, Wilkinson, for the sum allowed by the final decree, with interest, costs, &c., amounting in total on *on* the said 6th of January, 1859, to fifteen thousand one hundred and seventy-eight dollars seventy-one cents; which writ was, on the date last aforesaid, put into the hands of the United States marshal for the said district, or his deputies. That on this 10th day of January, 1859, I exhibited the said powers of attorney to the said defendant, Wilkinson, personally, and then and there made a demand of him, in the name of the complainant, for the payment of the amount allowed her by the said decree, together with all the interest accruing up to the date of said demand, and the costs of suit, when he, the said defendant, refused to pay the same, or any part thereof. That I was informed by a deputy of the said marshal, that on said 6th day of January, 1859, he exhibited the said writ of execution to the said defendant, Wilkinson, then and there handing to him a written statement of the amount due under the said decree, to wit, the said sum of $15,178\frac{71}{100}$, demanding payment of the said writ, or property sufficient to satisfy the same; when the defendant refused to pay the amount expressed in said writ, or any part thereof, or to point out property for seizure. And further affiant said not.

(Signed) FRANKLIN PERIN.

Subscribed and sworn to before me this 11th day of January, 1859.

(Signed) J. W. GURLEY,
*U. S. Com'r for East. Dist. of La.*

*Power of Attorney from Mary B. Penrose to Davis & Birney, annexed to foregoing.*

Know all men by these presents, that I, Mary B. Penrose, of the city of Philadelphia, and State of Pennsylvania, do constitute and appoint Messrs. Wilson Davis and D. B. Birney, being the firm of Davis & Birney, my true and lawful attorneys, for me and in my name to appear in any and every suit or proceeding, whether at law or equity, which has been or may hereafter be brought by or for me against Joseph B. Wilkinson, in the city of New Orleans, or elsewhere, and to issue all process upon any and every judgment or decree therein which may be necessary to enforce obedience by said defendant thereto; and generally to ask, demand, sue for, recover, and receive all such sum or sums of money, debts, or demands whatsoever, due, owing, or payable to me by the said Joseph B. Wilkinson, and to do all and every act whatsoever needful and necessary to be done in and about the premises, as fully and amply to all intents and purposes as I myself might or could do it, if personally present, and attorneys, one or more, under them, for the purpose aforesaid, to make and constitute and again at present revoke; hereby revoking all former powers by me granted to any other person or persons, and ratifying and confirming all and whatsoever my said attorneys now appointed, or their substitute or substitutes, shall lawfully do in and about the premises by virtue hereof.

In witness hereof Ihave hereunto set my hand and seal this twentieth day of December, A. D. 1858.

(Signed) MARY B. PENROSE. [SEAL.]

In presence of—
CLEMENT B. PENROSE,
HUGH TENER.

STATE OF PENNSYLVANIA,
*City of Philadelphia.*

Be it remembered, that on this twentieth day of December, in the year of our Lord one thousand eight hundred and fifty-eight, before me, Hugh W. Tener, a commissioner resident in said city of Philadelphia, duly commissioned and qualified by the executive authority, and under the laws of the State of Louisiana, to take the acknowledgment of deeds, &c., &c., to be used or recorded in said State of Louisiana, personally appeared Mary B. Penrose, to me known to be the constituent named in and who executed the foregoing letter of attorney, and acknowledged to me that she did sign, seal, and deliver the same, as her free act and deed, on the day and year therein mentioned, and for the consideration, use, and purposes therein explained.

In witness whereof, I have hereunto set my hand and affixed
[SEAL.] my official seal, the day and year aforesaid.
(Signed) HUGH W. TENER,
*Commissioner of Louisiana, for the State of Pennsylvania.*

PHILADELPHIA, *Dec'r 20th*, 1858.

F. PERIN, Esq.,
*New Orleans, La.*

DEAR SIR: We herewith substitute you as our attorney in the case of Penrose vs. Wilkinson, under the power of attorney from Mrs. Penrose to us, and authorize you to take all needful legal measures to compel payment of the sum due her, reporting to us your progress from time to time.

Yours, truly,
(Signed) DAVIS & BIRNEY.

*Affidavit of James Gillan, annexed to foregoing.*

Circuit Court of the United States, fifth circuit and eastern district of Louisiana.

MARY B. PENROSE
vs.
JOSEPH B. WILKINSON.
} No. 2,044. In Chancery.

James Gillan, being duly sworn, doth depose and say:

I am one of the United States marshal's deputies for said district. On the 6th day of January, A. D. 1859, I made a personal demand of the said defendant Wilkinson, for the payment of the amount expressed in the writ of execution (which issued in the said on the 6th inst.) then in my hands, together with the interest and costs due to the date aforesaid. At the same time left with him a written statement, showing the amount then due, to wit, fifteen thousand one hundred and seventy-eight dollars and seventy-one cents. He refused to pay the said amount, or any part of it. I then demanded property to satisfy said writ; which he refused to point out. And further affiant said not.

(Signed) JAMES GILLAN.

Subscribed and sworn to before me, this January 11th, 1859.
J. W. GURLEY,
*U. S. Com'r, East. Dist. of La.*

*Copy of Execution annexed to foregoing.*

Circuit Court of the United States for the fifth circuit, holding sessions in and for the eastern district of Louisiana.

The President of the United States, to the Marshal of the eastern district of Louisiana, or his lawful deputy, greeting:

You are hereby commanded, that you demand from Joseph B. Wilkinson twelve thousand three hundred and forty-three dollars and seventy-five cents, with interest thereon at the rate of five per cent. per annum from 16th April, 1855, till paid, and costs of suit.

| | |
|---|---|
| Clerk's costs | $104 15 |
| Marshal's costs (Scott) | 2 00 |
| Att'y's fee | 80 00 |
| Com'r's fees for report | 40 00 |
| Costs of comp't's depositions | 83 60 |
| Cost of comp't's copies, &c | 1 25 |
| Marshal's costs (Kennedy) | 2 00 |
| | 313 00 |

Cash, which Mary B. Penrose lately recovered by judgment of the circuit court of the United States for the fifth circuit and eastern district of Louisiana; and if the same be not paid on demand, that then you cause the same to be made out of the personal estate of the said Joseph B. Wilkinson, except slaves, in your district, if sufficient personal estate, exclusive of slaves, can be found therein; but if sufficient personal estate, exclusive of slaves, cannot be found in your district, that then you cause the sum to be made out of the real estate and slaves of the said Joseph B. Wilkinson, in your district, whereof he was owner on the 20th June, 1855, into whose hands soever the same may have come, and that you have those moneys before our said court, to render to the said Mary B. Penrose for the judgment aforesaid, on the 70th day from this, together with this writ.

Witness the Honorable R. B. Taney, Chief Justice of the Supreme Court of the United States, this 6th day of January, A. D. 1859, and (83d) year of the independence of the United States.

[SEAL.] J. W. GURLEY, *Clerk.*

*Execution and Marshal's Return.*

Circuit Court of the United States, for the fifth circuit, holding sessions in and for the eastern district of Louisiana.

The President of the United States to the Marshal of the eastern district of Louisiana, or his lawful deputy, greeting:

You are hereby commanded, that you demand from Joseph B.

Wilkinson twelve thousand three hundred and forty-three dollars and seventy-five cents, with interest thereon, at the rate of five per cent. per annum, from the 16th April, 1855, till paid, and costs of suit.

| | |
|---|---|
| Clerk's costs | 104 15 |
| Marshal's costs (Scott) | 2 00 |
| Att'y's fees | 80 00 |
| Com'r's fees for report | 40 00 |
| Costs of compl't's depositions | 83 60 |
| Costs of compl't's copies, &c | 1 25 |
| Marshal's costs (Kennedy) | 2 00 |

Cash, which Mary B. Penrose lately recovered by judgment of the circuit court of the United States, for the fifth circuit and eastern district of Louisiana; and if the same be not paid on demand, that then you cause the same to be made out of the personal estate of the said Joseph B. Wilkinson, except slaves, in your district, if sufficient personal estate, exclusive of slaves, can be found therein; but if sufficient personal estate, exclusive of slaves, cannot be found in your district, that then you cause the sum to be made out of the real estate and slaves of the said Joseph B. Wilkinson, in your district, whereof he was owner on the 20th June, 1855, into whose hands soever the same may have come; and that you have those moneys before our said court, to render to the said Mary B. Penrose, for the judgment aforesaid, on the 70th day from this, together with this writ.

Witness the Honorable R. B. Taney, Chief Justice of the Supreme Court of the United States, this 6th day of January, A. D. 1859, and 83d year of the independence of the United States.

| | |
|---|---|
| Clerk's costs | $ |
| Marshal's fees | $ |
| Mileage | $ |

[SEAL.] J. W. GURLEY, *Clerk.*

### *Marshal's Return.*

Received January 6th, 1859. On the 6th day of January, 1859, I demanded from Joseph B. Wilkinson payment of the debt, interest, and costs, as within commanded, and the said Joseph B. Wilkinson declined, failed, and refused to pay the same, or any part thereof. On the 6th day of January, 1859, I seized and took into my possession, at Greenville, parish of Jefferson, all and singular mentioned and described in a schedule thereof, hereto annexed, marked A, and made a part hereof. On the same day I served a notice of said seizure on the said J. B. Wilkinson, in due form of law. On the 4th day of March, 1859, I published a notice of the sale of said property so seized, by publishing the same in the Jefferson Journal, a newspaper printed and published in the parish of Jefferson, and also in the newspaper called the New Orleans Daily Delta, printed and published in the city of New Orleans. Said notices were in the English language, and were published continuously in the said newspapers from the 4th to the 21st day of March, 1859. Sale to take place at the court-house, in the said parish of Jefferson, at 12 o'clock noon, on Monday, the 21st day of March, 1859.

In pursuance of said advertisements, at 12 o'clock m. on Monday, the 21st day of March, 1859, I proceeded to sell the said property so seized and advertised for sale, and sold the same in lots to the highest bidder for cash. And the last and highest bidders for the several lots or items of said property, and the said last and highest bids for the same, were and are as set forth in detail in the schedule thereof, which is hereto annexed, and made a part hereof, and marked B, and the said property was by me adjudicated to the said highest bidders respectively, for the prices and sums for the several lots and items thereof, as stated and set forth in said schedule B, and the several purchasers of said property paid to me in cash the respective amounts of their several bids and purchases as aforesaid, making in the aggregate the gross sum of $158 82, as the total gross proceeds of said sales, all of which was paid to me in cash.

| | |
|---|---|
| Clerk's costs........................................ | $16 00 |
| Marshal's fees and costs and expenses....... | 140 47 |

$156 47, as per bill of said costs, fees and expenses hereto annexed, marked C. No other property found, and no money made or collected on and under this writ, except that which is herein above stated and set forth. And this writ is returned Sept. 26th, 1859.

(Signed) J. M. KENNEDY, *U. S. M.*
Per EMILE MARY, *D. M.*

*Document (A) referred to in Marshal's Return.*

MARY B. PENROSE }
vs. }
JOS. B. WILKINSON. }

List of Articles and Property seized in this suit.

1st. Five promissory notes or obligations to defendant: One note executed by John P. Wilde, dated August 16th, 1851, for $100, payable 5 months after date.

One note executed by Aaron Cox, dated May 12th, 1842, for $15, payable on demand.

One note executed by Aaron Cox, August 12th, 1843, for $20, payable on demand.

One note executed by Spencer Stenson, dated May 12th, 1842, for $92, payable on demand.

One note executed by Rodolphus and Potter, dated May 21st, 1836, for $20, payable on demand. Also an open account against John Fouler for $30.

2d. One old copper sugar kettle.

3d. One old horse, aged about 19 years.

4th. One old carriage.

5th. One old carriage.

6th. About 400 volumes of miscellaneous books, comprising altogether a well selected library for a private family.

To be sold on Monday, 21st March, 1859, at 12 o'clock m., at the court-house, at Carrolton.

*Document (B,) referred to in Marshal's Return.*

United States Marshal's Sale.—In the United States Court, eastern district of Louisiana.

Mary B. Penrose }
vs. } No.
J. B. Wilkinson. }

By virtue of a writ of fieri facias, to me directed in the above entitled cause, I have sold, this day, at auction, to the highest bidder, (Monday, the 21st of March, 1859,) at 12 o'clock m., in front of the court-house in Carrolton, in the parish of Jefferson, State of Louisiana, the following described property, to wit:

5 promissory notes or obligations to defendant—

One note, executed by John P. Wild, dated August 16th, 1851, for $100, payable five months after date.

One note, executed by Aaron Cox, dated May 12th, 1842, for $15, payable on demand.

One note, executed by Aaron Cox, dated August 12th, 1843, for $20, payable on demand.

One note, executed by Spencer Stenson, dated May 12th, for $92, payable on demand.

One obligation, executed by Rhodolphus Potter, dated may 21st, 1836, for $20, payable on demand; also an open account against John Fouler for $30.

| | | | |
|---|---|---|---|
| To Mr. Catoir | | | $5 00 |
| 3 vols. | of Litterateur, | to Commandeur, at 20 c. | 60 |
| 12 do. | Amer. Encyclopedia, | " Heaton, at 25 c. | 3 00 |
| 13 do. | Edinburgh do. | " Goldswaite, at 1 05 | 13 65 |
| 6 do. | Gibbon Rems., | " Cutler, at 50 | 3 00 |
| 2 do. | Roman Liberty, | " Catoir, at 45 | 90 |
| 4 do. | McCauley, &c., of Eng. | " Soldthwaite, at 20 | 80 |
| 4 do. | American Reme., | " do. at 5 | 20 |
| 8 do. | Analectic Magazines, | " Heaton, at 5 | 40 |

| | | |
|---|---|---|
| 6 vols. Hy. of England, | to Commandeur, at 30... | 1 80 |
| 3 do. History Gallery, | " do. at 55... | 1 65 |
| 2 do. Campbell's Foreign, Mag. | do. | |
| 7 do. Shakspeare, | Perin, at 40............ | 2 80 |
| 12 do. Writings of Washington, | Goldthwaite, at 65.... | 7 80 |
| 10 do. Lengard's History, | Penrose, at 15.......... | 1 50 |
| 2 do. Heber's Narrative, | Heaton, at 17½......... | 35 |
| 2 do. Walpole, | Goldthwaite, at 15.... | 30 |
| 2 do. Martin, Louisiana, | do. at 65.... | 1 30 |
| 5 do. U. S. Exploring Exp., | do. at 52½... | 2 62 |
| 3 do. Bancroft's His., | do. at 25.... | 75 |
| 3 do. Governor Morris, | do. at 10.... | 30 |
| 1 do. Virgil, | Perin..................... | 35 |
| 1 do. Gardner's Farmer, | Dreux..................... | 35 |
| 1 lot Indians Gallery, | Penrose.................. | 19 00 |
| 2 vols. Lacour & Garnishes, | Goldthwaite, at 70.... | 1 40 |
| 10 vols. *accorted*, | Penrose.................. | 3 00 |
| 1 lot of sundry works, | do. ................ | 14 00 |
| 1 old carriage, | do. ................ | 25 00 |
| 1 do. barouche, | do. ................ | 14 00 |
| 1 old horse, | do. ................ | 18 00 |
| 1 cop. sugar kettle, 300 lbs., | do. at 5 c.......... | 15 00 |
| Total.................................. | | $158 82 |

New Orleans, March 21, 1859.
(Signed) J. A. BONNEVAL,
*U. S. Dep. Marshal.*

*Document* (*C*) *referred to in Marshal's Return.*

U. S. MARSHAL'S OFFICE,
*New Orleans, March* 23*d*, 1859.

Circuit Court of the United States, eastern district of La.

MARY B. PENROSE }
vs. } 2,044.
JOSEPH B. WILKINSON. }

Certified Statement of Marshal's Fees.

| | | |
|---|---|---|
| 1856. | | |
| June 5. | Copy of decree.................................... | $2 00 |
| 1859. | | |
| | Clerk's fees.......................................... | 16 00 |
| Jan'y 6. | Writ of fieri facias................................ | 2 00 |
| " 27. | " " attachment ............................. | 2 00 |
| Feb'y 21. | 2 copies of notice................................ | 4 00 |
| " 24. | 1 copy of motion.................................. | 2 00 |
| March 4. | 1 copy of order .................................. | 2 00 |

| | | | |
|---|---|---|---|
| 1859. | | | |
| March | 9. | 1 copy of order | 2 00 |
| " | 11. | 1 copy of rule | 2 00 |
| " | 19. | 1 copy of order | 2 00 |
| " | 19. | Keeping from January 28th to February 26th, 1859 | 75 00 |
| " | 19. | Commission on $178 $\frac{82}{100}$ | 2 67 |
| " | 19. | Mileage | 4 30 |
| " | 19. | Drayage | 3 50 |
| " | 19. | Publication of sale in "Jefferson Journal" | 12 00 |
| " | 19. | Publication of sale in "Daily Delta" | 8 00 |
| " | 19. | Appraiser's fees | 10 00 |
| " | 19. | Inventory | 5 00 |
| | | | $156 47 |

*Minutes April Term, A. D.* 1859.

Monday, 17th October, 1859.

Court met pursuant to adjournment. Present, the Hon. Theo. H. McCaleb, district judge; absent, the Hon. J. A. Campbell, presiding judge.

MARY B. PENROSE
vs. } 2,044.
JOS. B. WILKINSON.

On motion of J. M. Kennedy, U. S. marshal, it is ordered that he have leave to amend his return upon a fi. fa. issued the 6th January, 1859, in the above entitled cause against the defendant, Joseph B. Wilkinson, nunc pro tunc, as of the 26th September, 1859, and to file therewith documents marked B, C, and D.

*Marshal's Supplemental and Amended Return.*

By leave of the court first had and obtained, I do make this my supplemental and amended return hereon as follows, to wit: On the 3d of February, 1859, I received the document purporting to be a surrender of certain real estate, or immovable property, (see following page,) by the defendant, which document is marked "A," by R. M. Lusher, esq., U. S. Com'r, and is now marked B, by myself, and is hereto annexed as part hereof. On the 3d day of Feb'y, 1859, I received a letter or communication from Joseph B. Wilkinson, jr., in which he claims and asserts that the said property, "houses and lots," are his property, and in his possession, and on which he warns me "not to levy upon the same," and which letter and communication of Joseph B. Wilkinson, jr., is hereto annexed and made a part hereof, and marked "C." In consequence of said communication marked "C," I did not seize or levy upon the said property mentioned in document marked B, nor upon any part thereof, and I declined making said seizure, with full assent of F. Perin, esq., attorney for pl'ff, as per his letter of 4th Feb'y, 1859, hereto annexed, and marked D; and this amended and supplemental return is made Oct. 17th, 1859, nunc pro tunc, as of the 26th Sept., 1859.

J. M. KENNEDY, *U. S. M.*
Per EMILE MARY, *Dep. M.*

*Document B, referred to in the Marshal's Amended Return.*

List of Property surrendered to the Marshal.

A half of a quarter section of land in the parish of Plaquemines, or money therefor, a mere claim unadjusted, say $50 00.

1 horse, aged about 19 years, worth about $50 00.

1 lot of books, three or 400 volumes, worth say $300 or $400.

One carriage, worth $100.

Another carriage, worth $125.

A note due me by A. Cox, for $15; another for $20.

A note of Spence Stinson, for $20.

A note of R. Potter, for $20.

Bounty land for services in the U. S. navy, under the act of March 3d, 1855.

John Towler owes me $30 00; lives at Balize.

A note of John P. Wilde, for $100 00, of no value.

One old copper sugar kettle or pan, worth about $70. None in parish of Plaquemines.

This is all the property I am owner of.

I now declare that my son, Joseph B. Wilkinson, jr., is the bona fide owner of the following real estate, situated in the city of New Orleans, State of Louisiana:

Two three-story brick houses, lots Nos. 168 and 170, fronting on Tchoupitoulas street, between Julia and Notre Dame. On these houses are 150 shares Citizens' Bank stock, with a stock loan amounting to about $4,790, a mortgage in favor of Joseph Cathcart for about $2,000. There are judicial mortgages on the same for about $3,000. Two lots with two-story brick houses, fronting on Tchoupitoulas st., Nos. 122 and 124, between Lafayette and Girod streets. Also three lots with three-story brick houses, Nos. 63, 65, and 67, on the same, fronting on Commerce street, and in the rear of the two houses above mentioned. On these last mentioned lots there is a mortgage in favor of Tyrronneaux for about $15,000; judicial mortgage for $2,500, with interest and costs; mortgage in favor of Payne & Harrison for about $60,000, all of which is paid except about $3,000. Should these properties sell for enough to pay all the incumbrances on them, by verbal agreements with Dr. Wilkinson, he is to pay me the surplus. But my opinion is that the above properties will not sell for enough to pay the incumbrances, and therefore will have no surplus to receive. The said properties were never in my name.

Owing to my being in bed and not having access to all my papers, I am unable to give more minute descriptions of said properties.

JOS. B. WILKINSON.

Exhibit "A," referred to in affidavit of defendant, before
ROBT. M. LUSHER, [L. S.]
*Commissioner of U. S. Ct. Court, 5th Circuit, &c.*
Feb. 3d, 1859.

*Document C, referred to in the Marshal's Amended Return.*

NEW ORLEANS, *February 3d*, 1859.

Kennedy, U. S. Marshal for the Eastern District of Louisiana:

Please to take notice that certain houses and lots surrendered by Jos. B. Wilkinson, sen., in the suit of Mary B. Penrose, are my property and in my possession, and you are warned not to levy on the same under such damages as the law may allow. The interest held by Mr. Joseph B. Wilkinson, sen., is a contingent one, accruing only after the satisfaction of certain claims for which I am responsible.

Respectfully,

JOSEPH B. WILKINSON.

*Document D, referred to in Marshal's Amended Return.*

NEW ORLEANS, *February* 3d, 1859.

Mr. PERIN, Esq.:

You will please examine the defendant's schedule, "A," annexed to his affidavit, with a list of real property, and the accompanying note of warning from J. B. Wilkinson, jr., and state whether I would be justifiable on seizing the said real property.

I am, very respectfully, yours, &c.,

J. M. KENNEDY,
*U. S. Marshal.*

F. PERIN, Esq.,
*Att'y for Pl'ff.*

FEBRUARY 4, 1859.

SIR: In reply to your note of the 3d inst., I have to state that, in my opinion, you would subject yourself to an action of damages by seizing property claimed by a third person under a legal title. It would require a bill in chancery to set aside the conveyance and subject the property to the execution in your hands before you could properly levy upon it.

I am, respectfully, &c.,

F. PERIN.

J. M. KENNEDY, Esq., *U. S. M.*

*Order for Attachment.*—Rec'd and filed 27th January, 1859.

Circuit Court of the U. S., eastern district of Louisiana.

MARY B. PENROSE
vs.
JOSEPH B. WILKINSON.

A petition has been submitted on behalf of the plaintiff, for an attachment against the defendant, for failing to perform the decree of this court, after due notice and demand.

The notice consists of a demand by the marshal of the district for payment of the amount of the decree, with the execution in his hands, a statement of which he left with him.

Subsequently Mr. Perin, having a power of attorney from the plaintiff, made a demand on the defendant for a performance of the decree. In both cases the defendant refused to perform it.

These acts entitled the plaintiff to an attachment for the clerk of the court, without an order from the court. The att'y in fact states, in his application, that he asked for the issue of attachment, and that the clerk declined to issue it. He is now ordered to do so.

(Signed) JOHN A. CAMPBELL,
*Associate Justice S. C. U. S.*

Washington city, 20th Jan'y, 1859.

To J. W. GURLEY, Esq.,
*Clerk of the Circuit Court of the U. S.,*
*East. District of Louisiana.*

Attachment issued, 27th January, 1859.

The President of the United States, to the Marshal of the United States for the eastern district of Louisiana, greeting:

You are hereby commanded to attach Joseph B. Wilkinson, so as to have him forthwith before our circuit court of the United States for the 5th circuit and eastern district of Louisiana, there to answer, as well touching a contempt which he, as it is alleged, has committed against our said court, as also such other matters as shall be then and there laid to his charge; and further, to perform and abide such order as our said court shall make in this behalf. And hereof fail not; and bring with you this writ.

Witness Hon. Roger B. Taney, Chief Justice of the Supreme Court of the United States, this 27th January, 1859.

[SEAL.] J. W. GURLEY, *Clerk.*

(*Endorsed:*)

Attachment for not complying with the decree rendered against him at the suit of Mary B. Penrose, No. 2,044 of the docket.

(*Endorsed:*)

Received Jan. 28th, 1859. On the same day I arrested, in the parish of Jefferson, the body of the said Joseph B. Wilkinson; but could not on that day produce him in court, for the reason that he was unable to leave his house with safety, as certified by his physician, Thomas Campbell, M. D.; which certificate is hereto annexed, marked (A.) On the day of , 1859, I produced and brought the said Joseph B. Wilkinson into court, as commanded; and on the same day he was released and discharged from my custody by the court.

Returned Sept. 26th, 1859.

(Signed) J. M. KENNEDY,
*U. S. Marshal.*
Per EMILLE MARY,
*Dep. Marshal.*

(*Certificate referred to in Marshal's return—A.*)

Mr. Wilkinson is suffering from an attack of erysipelas, and is unable to leave his house with safety to-day.

Respectfully,
(Signed) THOS. CAMPBELL, *M. D.*

Greenville, Jan. 28th, 1859.

*Minutes November Term*, 1858.

New Orleans, Tuesday, 1st February, 1859.

Court met pursuant to adjournment. Present, Hon. Theo. H. McCaleb, district judge; absent, Hon. J. A. Campbell, presiding judge.

MARY B. PENROSE
vs.
JOSEPH B. WILKINSON. } 2,044.

On motion of F. Perin, solicitor for the complainant, and on suggesting to the court that the defendant is now in custody of the marshal for contempt, in not obeying the order of the court, it is ordered that the cause be referred to J. W. Gurley, as master, to compute the interest on the principal sum due by him to the complainant, and to tax the costs of the proceedings to enforce the former order of the court, and that he report to-morrow morning, at 10 o'clock a. m.

*Report.*—Filed 2d Feb'y, 1859.

U. S. Circuit Court, east. district of Louisiana.

MARY B. PENROSE
vs.
JOSEPH B. WILKINSON. }

The undersigned, to whom this cause was referred by order of court of 1st Feb'y, 1859, with directions to compute the interest on the principal sum due under the decree by the defendant to the complainant, and to tax the costs of the proceedings to enforce the same, respectfully reports:

| | |
|---|---|
| Principal sum due under decree | $12,343 75 |
| Interest thereon at 5 pr. cent. per annum from 16th April, 1855, to 2d February, 1859, 3 years, 9 mo's, 17 days | 2,343 20 |
| Costs of suit down to issuing of attachment | 313 35 |
| Clerk's costs on attachment and of this report | 12 75 |
| | $15,013 05 |
| Add marshal's cost on attachment to date | 20 50 |

Respectfully submitted:

(Signed) J. W. GURLEY,
*Special Master.*

New Orleans, 2d Feb'y, 1859.

*Minutes November Term,* 1858.

New Orleans, Wednesday, 2d Feb'y, 1859.

Court met pursuant to adjournment. Present, Hon. Theo. H. McCaleb, district judge; absent, Hon. J. A. Campbell, presiding judge.

MARY B. PENROSE
vs. } 2,044.
JOS. B. WILKINSON.

The special master, to whom this cause was referred by the court on yesterday, this day filed his report upon the subject-matter of reference, and the parties making no objection thereto, it was ordered, on motion of complainant's counsel, that the same be confirmed.

*Minutes November Term,* 1858.

New Orleans, Wednesday, 2d February, 1859.

Court met pursuant to adjournment. Present, Hon. Theo. H. McCaleb, district judge; absent, Hon. J. A. Campbell, presiding judge.

MARY B. PENROSE
vs. } 2,044.
JOSEPH B. WILKINSON.

On motion of C. Roselius and J. Ad. Rozier, esqs., of counsel for the defendant, and on giving the court to understand and be informed that a writ of attachment has issued to bring the defendant before the court to answer for an alleged contempt, and on producing evidence that the defendant is confined to his bed by serious illness, in consequence of which said writ cannot be executed without endangering the life of the defendant; that the marshal of this court has appointed a keeper for the special purpose of imprisoning the defendant in his own house; that said proceedings and imprisonment are unauthorized by law, and are cruel and oppressive: It is ordered that said marshal and the complainant show cause forthwith why the execution of said writ should not be suspended until its execution can take place without endangering the life of the defendant, and that the keeper appointed as aforesaid be discharged. The complainant's counsel, F. Perin, esq., being present in court, the said rule was taken up for hearing, and after argument of counsel it was submitted to the court and taken under advisement.

*Certificate of Physician.*—Filed 2d Feb'y, 1859.

GREENVILLE, JEFFERSON PARISH,
*Jan'y 29th,* 1859.

This is to certify that I have been attending on Jos. B. Wilkinson, for the last month or three weeks, for the disease with which he has for some days been confined to his bed, and as his medical adviser, am of the opinion that, at present, he could not without danger to serious consequences be removed to the city of New Orleans.

(Signed) THOS. CAMPBELL, *M. D.*

Sworn to and subscribed before me, January 31, 1859.

(Signed) JOHN D. KAMPER, *J. P.*

*Minutes November Term,* 1858.

New Orleans, Thursday, 3d February, 1859.

Court met pursuant to adjournment. Present, Hon. Theo. H. McCaleb, district judge; absent, Hon. J. A. Campbell, presiding judge.

MARY B. PENROSE
vs.
JOSEPH B. WILKINSON. } 2,044.

And now appears Joseph B. Wilkinson, sr., by his counsel, Messrs. Roselius and Rozier, the said Wilkinson being confined by sickness to his bed, and being imprisoned at his own house by the marshal, and unable to appear in person before the court for the purpose of answering the writ of attachment and the charge of contempt which he, as it is alleged, has committed against this honorable court, and for the purpose of clearing himself of said alleged contempt. The said Wilkinson reserves all legal exceptions to the issuing said writ of attachment and process of contempt, which will be urged in a proper manner and at the proper time; with all due respect to this honorable court, denies said contempt, and now tenders his oath to this honorable court in order to purge himself of said alleged contempt, and to abide any order of the court whereby he can have an opportunity of clearing himself of said contempt, and moves the court to refer said matter and charge of contempt to a master in chancery, and to make an inquiry and examination into the true state of the property and affairs of the said Wilkinson. Whereupon it was ordered by the court that R. M. Lusher be appointed as special master to act in the premises.

*Minutes November Term*, 1858.

New Orleans, Thursday, 3d February, 1859.

Court met pursuant to adjournment. Present, Hon. Theo. H. McCaleb, district judge; absent, Hon. J. A. Campbell, presid*ent* judge.

Mary B. Penrose
vs. } 2,044.
Joseph B. Wilkinson.

The court having considered the application herein made on yesterday on behalf of the defendant, to have the attachment suspended, &c., &c., doth now order that the application be denied, and that the rule be discharged.

*Report of Special Master.*—Filed 24th Feb'y, 1859.

U. S. Circuit Court for 5th Circuit *Court* and eastern district of Louisiana.

Mary B. Penrose
vs. } 2,044.—In Chancery.
Joseph B. Wilkinson.

To the Honorable the Judges of the U. S. Circuit Court for the 5th circuit and eastern district of Louisiana, in Chancery sitting:

In pursuance of an order of this hon. court in the above entitled cause, dated 3d February, 1859, referring to me as a special master in chancery the "matter and charge of contempt" alleged against the defendant, and directing an "inquiry and examination into the true state of the property and affairs" of said defendant, I do now respectfully report that the solicitors for the complainant and the defendant, respectfully, having waived the ordinary summons and notices, and submitted to my consideration the following documents, viz: Defendant *defendant's* affidavit of 3d February; certificate of Thos. Campbell, M. D., filed 2d February; complainant's interrogatories to defendant, presented 5th February, with defendant's answers thereto, received February 12th; and deposition of J. P. Wilde, filed February 16th—the complainant offering no evidence, but reserving his "objections to the proceedings before the master, and to the testimony taken before him"—I thereupon proceeded to a careful examination of the matters referred to me, and am satisfied—

I. On the matter and charge of contempt.

1st. That at the time of the service of the attachment, the defendant was physically unable to attend the court in person, owing to sickness, which, in the opinion of his medical adviser, requires his confinement to bed, and from which he had not yet recovered on the 12th February inst.

2d. That the defendant has no other available means to satisfy the decree of the court in favor of the complainant than the property and assets described in Exhibit (A) annexed to his affidavit of 3d February, 1859, and which he appears to have surrendered to the marshal.

II. On the true state of defendant's property and affairs.

1st. That, as appears by defendant's answers to complainant's interrogatories, he contributed in March, October, 1850, or thereabouts, towards the purchase by his son, J. B. Wilkinson, jr., of divers real property in this city, the sum of \$30,146 $\frac{28}{100}$, (derived from sale of property purchased from complainant in St. Louis, Mo.,) and that by the understanding between him and his son, so soon as J. B. Wilkinson, jr., shall be released from the liabilities or responsibilities assumed by him for his father, stated at \$33,853 $\frac{72}{100}$, for stock, notes, loans, &c., and mortgages bearing on said property, he will sell the property so held by him, and pay over to defendant, or his representatives, such portion of the proceeds as shall remain after satisfaction of his said liabilities.

2d. That, as also shown by defendant, in addition to the mortgages assumed by his son as aforesaid, there are others existing on a large portion of said property to the extent of \$7,000, and upwards, (interest and costs in favor of Joseph Cathcart, Maunsell White, and the estate of Geo. W. Johnson, respectively,) and that defendant has likewise acknowledged his indebtedness to Payne & Harrison for \$46,770 17, with judicial lien on said property, his release from which indebtedness is stated to be dependent on his settlement of the amount due the estate of Geo. W. Johnson.

3d. That, as is shown by the testimony of John P. Wilde, there has been no apparent extravagance in the defendant's style of living, or of maintaining his household, since 1850–'51, and, by the defendant's own averments, that the present embarrassed condition of his affairs is attributable to errors of judgment, misfortunes in business, and other circumstances adverse to his efforts to retrieve his fortunes.

4th. That, as further appears by the defendant's affidavit, and his answers to complainant's interrogatories, he has surrendered to the marshal all the property and assets that he owns, and that in support of his prayer for discharge he has taken the oath prescribed in the 2d section of the act of Congress of Jan. 6th, 1800, (Chap. IV,) entitled "An act for the relief of persons imprisoned for debt."

Annexed hereto are the several documents produced before me on the reference herein.

Respectfully submitted.
(Signed) ROB'T M. LUSHER,
*Special Master in Chancery.*

Feb'y 21, 1859.

*Defendant's Affidavit referred to in the foregoing Report.*—Filed 3d Feb'y, 1859.

Circuit Court of the United States.

MARY B. PENROSE
vs. } In Chancery.
JOSEPH B. WILKINSON, senior.

Before Robt. M. Lusher, U. S. com'r, and of said court, the said Joseph B. Wilkinson, now in the custody of the marshal, on a charge of contempt of court, in the above entitled suit, being duly sworn, says: At the time the marshal executed the writ of attachment herein issued, he was confined to his bed by sickness of a serious character; he is still confined to his bed, and is advised by his medical adviser and physician, that it would be dangerous for him to leave his sick room; he is and has been unable to make his personal appearance in court, so as to answer said charge of contempt; had it not been for his physical inability, he would have cheerfully made his personal appearance in court, for the purpose of purging himself of said alleged contempt of court, and abiding the further orders of this honorable court.

Affiant has the highest respect for this tribunal and the members who compose it, and would willingly comply with the decree of this court, in the above entitled cause, if the same were in his power. Affiant denies having been guilty of any contempt of court. Affiant has surrendered to the marshal all the property and assets that he owns, in order to satisfy the said execution issued in virtue of said decree, so far as the same will go; they are of little or of no value, and a list of the same is hereunto annexed, and marked "A." And now affiant solemnly swears that, with the exception of the above property surrendered as aforesaid to the marshal, he has no estate, real or personal, in possession, or remainder or reversion, other than necessary wearing apparel, and he has not, directly or indirectly, given, sold, leased, or otherwise conveyed to or intrusted any person or persons with all or any part of the estate, real or personal, whereof he has been the lawful owner and possessor, with any intent to secure the same, or to receive or expect any profit or advantage therefrom, or to defraud his creditors, or have caused or suffered to be done anything else whatsoever, whereby any of his creditors may be defrauded. Affiant trusts that he has fully answered the alleged charge of contempt of court, and that this honorable court will be pleased to discharge him from the custody of the marshal; and affiant is ready at any time to comply with any further order of this court.

Affiant wishes to avail himself of the benefit of the law passed in favor of insolvent debtors, and respectfully asks the aid and assistance of the court, so as to extend to him the benefit of said laws, and that he may be discharged from imprisonment.

(Signed) JOS. B. WILKINSON.

Subscribed and sworn to by the deponent, at his residence, Greenville, parish of La., this third day of February, A. D. 1859, before

[SEAL.] ROBT. M. LUSHER,
*Commissioner of U. S. Circuit Court,*
*5th Circuit, and Special Master.*

Certificate of Thos. Campbell, M. D., referred to in foregoing report. See page .

*Interrogatories referred to in the foregoing report.*—Filed Feb'y 24th, 1859.

Circuit Court U. S.—No. 2,044.

Mary B. Penrose
vs. } In Chancery.
Joseph B. Wilkinson.

Interrogatories to be propounded to defendant, J. B. Wilkinson:

Int. You have stated in your Exhibit A, sworn to and annexed to your affidavit of the 3d Feb'y, 1859, that your son, J. B. Wilkinson, jr., is the owner of certain real property, situated in New Orleans; will you please state at what time the said property was purchased, upon what terms, cash or credit, and whether with money furnished, directly or indirectly, by yourself? If you answer that the said money was not furnished by you for the purchase of said property, please state fully upon what inducement or consideration did your son agree to give you the surplus after paying off incumbrances; and state further in what manner and from *whose* did your son raise the funds with which he made the said purchases.

Int. 2. Does Exhibit A contain a list of all the property standing in the name of your son, purchased and held upon the condition with the property named?

Int. 3. Please state whether your wife has not, within the last six or seven years, taken in her own name a large amount of property in money, slaves or lands, which, at some period within the time stated, belonged to you; if yea, annex a list of every kind of such property, with the dates at which each piece was purchased or taken in her name, and the value thereof; and state particularly by what right or claim was the said property taken in her name, and what portions or parcels thereof are still in her possession.

Int. 4th. If you answer that any of said property was so taken by your wife to satisfy any judgment against you for separation of property, please state in what court such proceedings were had, the date on which the petition was filed, and the judgment rendered, and for what amount, and whether said judgment has been nominally satisfied. Annex to your answer hereto copies of the proceedings for separation of property, if the same were had in any court out of the parish of Orleans.

Int. 6th. The evidence in this case shows that you realized out of the property you purchased of the complainant in St. Louis, about one hundred thousand dollars, out of which you owed her the amount allowed by the decree of this court. You will please give a precise and detailed statement, showing in what manner you have disposed of said money; if expended in the purchase of property, state particularly for what property, where situated, and the price of each piece or parcel separately, and in whose name purchased, and in whose name now held, and if any portion thereof has been since sold, to whom, and for what consideration; and if you made donations of any portion of said money, state to whom, at what time, and how much to each one respectively.

Note.—The complainant will expect full and perfect answers to all of the foregoing interrogatories.

(Signed) F. PERIN, *Solicitor.*

Answers of def't to foregoing, Feb'y 12th, 1859, before
[SEAL.] ROBERT M. LUSHER,
*Com'r and Master in Chancery.*

*Defendant's Answers to the foregoing Interrogatories, referred to in Master's Reports.*—Filed 24th Feb'y, 1859.

Circuit Court of the United States.

MARY B. PENROSE
vs.
JOSEPH B. WILKINSON.
} In Chancery.

Answer of defendant to the interrogatories put in this case:

1st. Interrogatory. Marcus A. Finch conveyed to Joseph B.

Wilkinson, jr., a certain house and lot bounded by Front, New Levee and Suzetto streets, and Withers' alley; the consideration for the same being $10,000, of which $2,000 were paid in cash or by exchange of property near St. Louis, Mo., by Joseph B. Wilkinson, sr., Joseph B. Wilkinson, jr. assuming payment of a stock note due the Citizens' Bank of Louisiana for $4,810; also a note for $1,156 16; also notes for $2,033 84; the first payable in March, 1851. The dates of payment for others not remembered, but believed to be within twelve or twenty-four months. There were 130 shares of Citizens' Bank stock, on the above house and lot. This property was sold under the execution by the Citizens' Bank, for arrears of principal and interest on the above stock loan.

| | |
|---|---|
| It will appear by the above statement that Joseph B. Wilkinson, sr., paid | $2,000 |
| And that there was assumed by Joseph B. Wilkinson | 8,000 |
| Total | $10,000 |

The above named Marcus A. Finch also conveyed to Joseph B. Wilkinson, jr., two houses and lots, numbers 168 and 170, situated on Tchoupetoulas street, between Julia and Notre Dame. At the time of the above sale there were 164 shares of Citizens' Bank stock on said houses; also a stock loan for $6,068; there was also a loan in favor of Chamberlain, for $1,785 72; all of which had to be assumed by the said Joseph B. Wilkinson, jr.; since which time other liens have been placed on said property, to wit: one for about $2,000 or over in favor of Joseph Carthcart; also a judicial mortgage in favor of Colonel Maunsell White for about $2,500, with interest and costs from the date of judgment; which will more fully appear upon reference to record of court, or by the inscription of same in the mortgage office in New Orleans.

| | |
|---|---|
| The consideration given for this property was $15,000, of which there paid by Joseph B. Wilkinson, sr., by property taken in exchange near St. Louis by Marcus A. Finch | $7,146 28 |
| And there was assumed by Joseph B. Wilkinson, jr., stock loan to Citizens' Bank | 6,068 |
| Note to Chamberlain | 1,785 72 |
| Total | $15,000 |

Of which paid by J. B. Wilkinson, sr., $7,146 28; by Joseph B. Wilkinson, jr., $7,853 72.

There were sold by Wm. C. and A. R. Taylor two houses and lots fronting on Tchoupetoulas st., between Lafayette and Girod streets, being Nos. 122 and 124; also three houses and lots fronting on Commerce street, Nos. 63, 65 and 67, and in the rear of the two houses above mentioned. Acts of sale for the above property for Joseph B. Wilkinson, jr., executed by W. C. and A. R. Taylor, at the city of St. Louis, the 28th day of October, 1850, recorded in the office of Wm. Christy, notary public, the 27th day of November, 1850. At the date of the sale of the above houses there existed on them the above mortgages; one in favor of the late Charles Jacobs for $12,000, and one in favor of the heirs of Staunton for $6,000. On the above mortgages $3,000 were paid, and a new loan negotiated with a Mr. Tyroneaux, of Paris, (in France,) through the agency of Mr. Carl Kohn, with Joseph B. Wilkinson, jr., he giving his notes for the amount borrowed, $15,000, bearing 8 per cent. interest and commissions for effecting same. Certain other judicial mortgages exist on the above property, to wit: One in favor of Col. Maunsell White for about $2,500, with interest and costs, &c., being the same as before mentioned bearing on the other property. Also a claim of the estate of the late George W. Johnson for about $2,500, with interest from (date not remembered.) There is also a heavy judgment acknowledged in favor of Messrs. Payne and Harrison for $46,770 17, which will be relieved by them on the settlement of the claim due the estate of the late George W. Johnson. The judicial lien above mentioned bears equally on all the above mentioned city property, of course except that sold by the Citizens' Bank. The consideration for which the above last mentioned property was sold by W. C. and A. R. Taylor was for the sum of $39,000, to wit: paid in money or by exchange of property in St. Louis by Joseph B. Wilkinson, sr., $21,000, and assumed by Joseph B. Wilkinson, jr., the amount of mortgage to Charles Jacobs $12,000, and to the heirs of Staunton $6,000:

| | |
|---|---|
| By which statement it would appear that was paid by Joseph B. Wilkinson, sr., by property at St. Louis, equal in value to | $21,000 |
| And there was assumed and paid by Joseph B. Wilkinson, jr | 18,000 |
| Total | $39,000 |

The whole above mentioned property costs $64,000:

| | |
|---|---|
| Of which it would appear there was paid by Joseph B. Wilkinson, sr., the sum of, in property exchanged | $30,146 28 |
| And assumed by Joseph B. Wilkinson, jr | 33,786 72 |
| Total | $64,000 00 |

Now the understanding between Joseph B. Wilkinson, junior, and the defendant is, that whenever the said Joseph B. Wilkinson, junior, may be released from all responsibilities for which he may be liable on account of the defendant and the assumpsit made in the purchase of the said property hereinbefore described, and which responsibilities it is believed are herein enumerated, then he has agreed to sell the said property and pay over to the defendant, or to such legal claimants as may be entitled thereto, whatever surplus may remain after satisfaction of his said liabilities. It may be observed, that the sales of these houses and lots took place before the institution of any suit by Mary B. Penrose vs. Joseph B. Wilkinson, senior, and consequently before any adjudication in the said suit, and before even the first instalment for the St. Louis property was due, for which two notes, at her request, has been given—one for $2,500, another for $500—both dated the 24th day of May, 1850, due one year after date, to wit, the 24th day of May, 1851, and duly paid at maturity at the Mechanics and Traders' Bank.

Answer to 2d interrogatory. Exhibit (A) annexed to my affidavit contains a list of all the property owned or standing in the name of my said son, either in the city of New Orleans or elsewhere, acquired or held upon any similar condition with the property hereinbefore described, or any other condition.

Answer to interrogatory 3d. My wife, Mrs. Catherine Wilkinson, has not within the last six or seven years, or indeed at any time whatever, that I am aware of, or to the best of my knowledge and belief, purchased or taken any property whatever in money, slaves or land, or of any other description, which belonged to me.

Answer to interrogatory 4th. I am not aware and do not know of any property taken by my said wife to satisfy any judgment against me, unless the few negroes decreed to her as her paraphernal property, adjudicated to her in the suit for separation of property, dated June 24th, 1829, a copy of which is herewith annexed, which judgment was duly satisfied by placing her in possession of said property, or by her being already in possession of said negroes. My wife, by judgment, obtained separation of property, as before stated, in the year 1829. All the property now held or claimed by her is her individual property, in which I have no interest, direct or indirect, nor has she purchased any of said property with any funds by me furnished to her, directly or indirectly; it is in law and equity her own.

Answer to interrogatory 5th. My sales of property in the vicinity of St. Louis did not amount to $100,000, as will be seen by the following schedule of property sold, taken in part from my answer to the petition of Mary B. Penrose, to wit:

Sale to Henry:

1850.

| | | | |
|---|---|---|---|
| May. | $14\frac{30}{100}$ acres as per deed, taken at valuation | $8,000 | |
| August. | To Wm. C. Taylor, sale 32 acres for , payable in one and two years from date of sale | 16,000 | |
| August. | To Wm. C. Taylor and A. R. Taylor, 38 acres taken in part payment for property in New Orleans, valued at | 21,000 | |
| " | To H. F. Bentgan 3 acres, payable in two and three years, with 6 per cent. interest. | 1,800 | |
| " | To Frederick Stenne 5 acres, $\frac{1}{3}$ cash, balance in one and two years | 3,000 | |
| May. | To Louis Bissell 8 acres, $1,500 cash, balance in one and two years | 5,000 | |
| July. | To Marcus A. Finch $16\frac{2}{3}$ acres, exchanged for the property in New Orleans, valued | 9,146 | 28 |
| Sept. | To John F. Darby $24\frac{25}{100}$ acres, for | 14,820 | |
| | $3,705 payable in March, 1851; balance in 3 equal instalments, from the 1st October, 1851. | | |
| | To Mrs. Allen, of St. Louis, $\frac{90}{100}$, ninety hundredths of an acre | 300 | |
| | | 79,066 | 28 |
| | Exchanged with Dr. J. G. Bryan, 37 for other property near St. Louis; that conveyed him was valued at $400 per acre, say equal to $14,800. The property received in exchange from him was estimated at that time at a similar value, but was subsequently sold under a deed of trust for $10,196 25, and deducting expenses, netted $9,867 28, making a loss of $4,932 72 | 14,800 | |
| | | $93,866 | 28 |
| | After the possession of the rest of the property had been obtained, there was a compromise entered into with James E. Yeatman, of St. Louis, for some three or four acres which he held, and which there would have been much difficulty in obtaining. Well as remembered, the amount received was about $4,000, of which one-half was defendant's, say | 2,000 | |

| | |
|---|---|
| There was also a sale of about two or three acres (to a man whose name is not remembered) in the rear of the land of Yeatman's valued about $2,000, one-half to defendants.................................... | 1,000 |
| | $96,866 28 |

The two last charges are made entirely from remembrance; the defendant not having any memorandum or papers relative thereto, but believes there is not any inconsiderable difference in amounts stated. The date is not numbered, but believes to be somewhere in the spring of 1851.

No other property has been purchased by the proceeds of the sales of property in St. Louis, except what has been hereinbefore mentioned, situated in the city of New Orleans, and what was exchanged for property near the city of St. Lous, with Dr. Bryan, and afterwards sold under a deed of trust.

The sales and prices for all the above mentioned property has already been mentioned.

The defendant donated to Major Louis Bissell, from whom had been recovered a large and valuable portion (of the Penrose tract of land,) a small parcel of land, $\frac{44}{100}$ of an acre, which had been long used by him as a family cemetery, where the ashes of different members of his family reposed.

I have not made donations of any portion of the money arising from sales property near St. Louis, to any person whatsoever.

The proceeds of the above property have been expended in the following manner, to wit:

| | |
|---|---|
| To Marcus A. Finch, for the house and lot situated at the corner of Winter's alley and Front, on New Levee street............. | $2,000 |
| To Marcus A. Finch, for houses and lot, 168 and 170, on Tchoupitoulas; also by exchange of property in St. Louis..... | 1,746 28 |
| To Wm. C. and A. R. Taylor, for houses bought of them, before mentioned, paid for in part by property near St. Louis, taken in exchange, valued at.............. | 21,000 |
| To Messrs. Chouteau & Vallee, for services rendered in all business *for services rendered in all business* connected with the recovery of the property near St. Louis, which services were very valuable and indispensable to defendant, 14 $\frac{30}{100}$ acres, valued at...................................... | 8,000 |

| | | |
|---|---|---|
| | One note of Wm. C. Taylor, paid to Messrs. Henry Chouteau and Nerie Vallee, in part payment of $25,000, lent by the said Chouteau & Vallee to the defendant in the month of May, 1850.................... | 8,000 |
| | The property exchange with Dr. Bryan, valued at $14,800, and received at the same.......................................... | 14,800 |
| | The said property was sold under a deed trust in part satisfaction of the said $25,000, for the net amount of $9,867 28, showing a loss of $4,932 72. | |
| 1851.<br>Jan. 23. | Amounts paid to Maunsell, White, & Co. on account due by defendant to them for various advances.............................. | 9,500 |
| | To this amount paid to Colonel Maunsell White, well as remembered, by notes transferred to him in the autumn or winter of 1850, about............................ | 18,000 |
| | Paid Messrs. Chouteau & Vallee at different times between $5,000 or $6,000, say...... | 6,000 |

The defendant would further observe that the prosecution of this suit for the Benito Vasquez or Penrose claim, as it was called, was attended with great difficulty and heavy expenses, exclusive of the heavy fee to the counsel employed by Miss Mary Penrose herself, and which she agreed should be given on the recovery of the property, which had to be deducted from the property recovered. The defendant had to pay heavy sums of money for the prosecution of the said suit and obtaining possession of said property after adjudication of the property by the supreme court, to wit:

| | |
|---|---|
| To Liffingwell & Elliott and other parties, for surveying the said tract of land, making plats thereof, and dividing the same into lots, and to the commissioners appointed by court for apportioning the same among the different claimants—say | 1,501 |
| To Mr. Thomas Ewing, for arguing the case in the supreme court. | |
| | 95,946 28 |

| | | |
|---|---|---|
| | To various counsel employed in St. Louis, including the value of about 4 acres of land | 2,500 |
| | To which will be added the sundry expenses incurred by the defendant during the prosecution of this suit, which are not charged. | |
| 1851.<br>May 24. | To this amount paid to Mary B. Penrose, being the first instalment due her | 3,000 |
| | | 101,446 28 |
| | From which deduct loss on sale of the property exchanged with Dr. Bryan | 4,933 |
| | | 96,518 28 |

In my answers to the above interrogatories, they have been made in many instances from memory, not having access to any notes or memoranda relative to the same, and may therefore in the amounts of sales and prices stated be inaccurate, although generally the difference is believed to be very inconsiderable. It would be observed that the sales of the property in St. Louis and of the property purchased in the city of New Orleans were made in year 1850, and the transactions generally arising therefrom occurred in the same year or early in 1851, before any payment of the principal to Mary B. Penrose became due, and before the institution of any suit in the United States circuit court had been commenced; at which time the defendant believed he had a right to make any disposition of the property he thought proper, not meaning to defraud her. That it was not done for the purpose of effecting in any manner any contrivance or device whereby Mary B. Penrose, the plaintiff, was to be in any way prejudiced, directly or indirectly; that I had no such views or intentions; on the contrary, my intention always was to pay her the amount of money to which she would be entitled as the instalments became due, and to which I verily believed I would have been able to do, had it not been for the unwise and unjust steps she took against me in bringing this suit in chancery, as is evidenced by my payments even in advance of such interest as became due to her from time to time under the contract of the 7th November, 1845, and of the punctual payment of the first instalment of $3,000 at maturity, for evidence of which, reference is had to papers on file in the said suit instituted 13th September, 1851; that at the time the St. Louis property was sold it was not done for purpose of avoiding any payments that might become due to Miss Penrose; that I expected to meet the instalments as they became due, beyond any possibility of doubt;

that owing to misfortunes in the result of business operations, decline of property, and the unjust conduct of Mary B. Penrose in instituting this suit for the avoidance of a contract that was entered into at her particular request, I believe I could have fulfilled my engagements to her; that I had not at the time the most remote idea of my inability to do so. Since the rendition of the decree, however, I have not, had I done anything to avoid the process of this court or any execution that might be issued in virtue of said decree.

Finally, I did not dispose of the property recovered in St. Louis for the purpose of or the remotest intention to prejudice the rights of Mary B. Penrose, or to conceal or make way with the proceeds of the sales or other property which was received in exchange, so that I might be able to avoid the payment of any money that was due, or might become due her, or to avoid or frustrate any execution or process that she might sue out in virtue of any judgment or decree of any court of justice that might thereafter be rendered in her favor against me; but solely because I considered these transactions as advantageous to my pecuniary interest, and with no other motive whatever. As events proved, I committed an error of judgment in selling or disposing of the St. Louis property. Had I resided there, I should not have done so; but residing in Louisiana, I thought the most advantageous course was to make the investments in New Orleans. Subsequent events proved too late the error into which I fell. I was deceived in the value of the property purchased by Dr. Wilkinson at my request. These selections were not judiciously made. Property depreciated in the district where they were situated. Taxes were heavy, repairs of the houses expensive, and instead of being able to sell to advantage, have not been able to do so without a very heavy and ruinous loss. Had I known then what subsequent events taught me, I should have retained the property in St. Louis, and the result would have been as much in my favor as that of Mary B. Penrose. Unfortunately she instituted the chancery suit against me for a recision of the contract previously made with me, thereby seriously impairing what credit I possessed, and embarrassed my business operations. I was, however, notwithstanding this unfortunate suit, and during its pendency, of the opinion and belief that I would finally be enabled to pay her such amount of money as might be agreed.

This court was far from sustaining her pretensions, as the decree shows.

Had she claimed from me that to which she was alone entitled, and not instituted this suit and being the cause of what I have hereinbefore fully stated, she would now, I verily believe, be in the enjoyment of her money. I am, however, resigned to my losses, and more especially regret the consequence of the errors of judgment, as above detailed, inasmuch as they prevent my fulfilment

**of the decree which this court has awarded against me, so that at least I might have avoided the harsh, *righous*, and unjust measures pursued by her in this suit, more especially at a time when confined to my bed by serious illness.**

(Signed) JOS. B. WILKINSON.

Sworn to and subscribed by the defendant, Jos. B. Wilkinson, at his domicil, Greenville, parish of Jefferson, La., this 12th February, A. D. 1859, before—

(Signed) ROBT. M. LUSHER,
[SEAL.] *Com'r and Master in Chancery.*

*Document referred to in Defendant's Answer to 4th Interrogatory.—* Filed 24th Feb'y, 1859.

State of Louisiana, Fifth District Court of New Orleans.

No. 8,344.

I hereby certify, that on the 24th day of June, 1829, judgment was entered in this court in the suit of Catharine Wilkinson vs. Joseph B. Wilkinson, in the words and figures following, to wit: On motion of Geo. A. Waggaman, esq., of counsel for the petitioner, on giving the court to understand that no appearance has been made for the defendant, nor motion made to set aside the judgment by default, taken on the 13th day of the present month, the court, after hearing the testimony produced by the plaintiff, and being satisfied with the same, and that a separation of property between the parties is necessary in consequence of the state of the defendant's affairs, order and adjudge that the said judgment by default taken in this case be now confirmed, that a separation of property take place between the plaintiff and defendant according to law, and that the pl'ff recover and possess as her own property one-sixth part of a tract of land containing fourteen hundred acres, situated on the Kentucky river at the mouth of Eagle creek; one-sixth part of a tract of land, containing fourteen hundred acres, situated in county, State of Kentucky; one-sixth part of a tract of land in Kanawha county, State of Virginia; one-sixth part of a house and lot in Williamsburgh, Virginia; and one-sixth part of a tract of land near Norfolk, Virginia; and the following slaves, to wit: Betsy, Susan, William, John, Hicks, Jane, Hannet, Rosse, Susan, Fanney, and Jack; and lastly, it is ordered that the defendant pay costs.

24th June, 1829.

(Signed) JOSHUA LEWIS.

Signed 3d July, 1829.

(Signed) JAS. L. LEWIS, *Cl'k.*

Judgment recorded in judgment docket , page , which costs amount to the sum of dollars and cents, exclusive of the sheriff's fees.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at the city of New Orleans, on this 7th day of February, in the year of our Lord one thousand eight hundred and fifty-nine, and in the 83d year of the independence of the United States.

[SEAL.]

(Signed) JOHN G. GUERIN,
*Dep. Clerk.*

*Deposition of Jno. P. Wilde referred to in Master's Report.*—Filed 16th February, 1859.

In the U. S. Circuit Court.

MARY B. PENROSE
vs.
JOSEPH B. WILKINSON.

I am well acquainted with the defendant and his family; have known them since 1850–'1; have frequently been at his house, both in the parish of Plaquemine and at Greenville. When I first got acquainted with Mr. Wilkinson and his family he resided in parish of Plaquemine; have spent three or four weeks at his house while he lived there; have constantly been in the habit of visiting at his house; have frequently visited the family since he has resided at Greenville. His house is very plainly furnished; his style of living also plain; far from what I should style either luxurious or magnificent. I have frequently had opportunities of judging of their style of living from my frequent visits. The furniture of the entire house is what I should term of the plain ordinary character; there is no attempt at style; the family live comfortable but but plain; no extravagance or luxury whatever is indulged. Consider I have had very good chances of judging, as I have frequently visited his house since the last four or five years, and especially since he removed to Greenville. And further deponent saith not.

(Signed) JOHN P. WILDE.

Sworn to and subscribed before me this 16th day of February, 1859.

(Signed) N. R. JENNINGS,
*U. S. Commissioner.*

Reserving all objections to this deposition, and to the course pursued by defendant and his counsel, I decline to put cross-interrogatories, waiving, however, notice and time of taking this deposition.

(Signed) F. PERIN,
*For Compl't.*

## *Complainant's Exceptions to Master's Report of Febr'y 21st, 1859.* Filed 24th Feb'y, 1859.

Circuit Court of the United States, fifth circuit and east. dist. of La.

MARY B. PENROSE
vs. } No. 2,044. In Chancery.
JOS. B. WILKINSON.

Exceptions taken by the said complainant to the report of Robert M. Lusher, esq., one of the masters of this court, to whom it was referred to report as to the "matter and charge of contempt," alleged against the defendant, and directing an inquiry and examination into the true state of the property and affairs of said defendant, Wilkinson:

1st. For that the said master has, in and by his said report, certified in the matter and charge of contempt, "that at the time of the service of the attachment the defendant was physically unable to attend the court in person, owing to sickness, which in the opinion of his medical adviser required his confinement to bed, and from which he had not recovered on the 12th of February inst." Whereas the said master should not have certified any matter in reference to the inability of the defendant to attend the court at the time the attachment was issued, or at any other time, inasmuch as such inability constituted no part of the original contempt for which the said attachment issued.

2d. For that the said master hath certified, in the matter of the said contempt, "that the defendant has no other available means to satisfy the decree of the court in favor of the complainant than the property and assets described in exhibit A, annexed to his affidavit of 3d February, 1859, and which he appears to have surrendered to the marshal;" whereas the said master ought not to have certified or suggested, in his said report, that a surrender by defendant of all his available means would purge him from the alleged contempt.

And, as to the facts of the matter, the said master ought to have certified, upon the evidence before him, that the said defendant has not surrendered all his property to the marshal, and that he has other property and assets than those described in the said exhibit A; for it appears that, on reference to the 9th and 10th pages of defendant's answers to the interrogatories propounded by the complainant, on the 5th of February, 1859, that, in the years 1850 and 1851, he received advances from Maunsel White to the amount of $27,500, which might have been invested in real estate, stocks, and other property; and the same may be affirmed of the advances of $25,000, made by Chouteau & Vallée, of St. Louis; and so of other sums composing the $\$96,513\frac{28}{100}$, derived from the complainant's property in St. Louis, and not satisfactorily accounted for, either in his ex. A, or in his answers to the said interrogatories.

And it further appears, by reference to the said ex. A and the answers to the said interrogatories, that defendant has not surrendered the real estate situated in New Orleans, which was purchased for the use and with the funds of the defendant; but in the name of his son, Joseph B. Wilkinson, jr., inasmuch as the titles to the said real property can only be evidenced by written acts, and there being no such written acts or any acknowledgment on the part of the said Joseph B. Wilkinson, jr., the legal owner, as to any interest the said defendant may have therein.

II. For that the said master hath certified, in reference to "the true state of defendant's property and affairs," that the defendant contributed $\$30{,}146\frac{28}{100}$ towards the purchase of the said real estate in New Orleans, in the name of his said son; that the defendant confessed judgment in favor of Payne & Harrison, nominally, for the sum of $\$46{,}770\frac{17}{100}$; but, in reality, for the purpose of securing the said Payne & Harrison in the sum of $2,500 only, (as appears by the answer of defendant to the said interrogatories,) due the estate of Geo. W. Johnson; that the present embarrassed condition of defendant's affairs is attributable to his errors of judgment, misfortunes in business, &c.; and that finally, "defendant has surrendered to the marshal all the property and assets that he owned, &c."

Whereas the said master ought to have certified that, in violation of the said act of Congress of January 6th, 1800, the defendant placed his said property, to the amount of said $\$30{,}146\frac{28}{100}$, in the hands of his said son Joseph, without any consideration, and for the purpose of defrauding the complainant; that said defendant has further violated the provisions of the said act, by giving the said judicial lien for the said sum of $\$46{,}770\frac{17}{100}$; that the defendant has not satisfactorily accounted for the balance of the $\$96{,}513\frac{28}{100}$, received of the defendant, beyond the said sum of $\$30{,}146\frac{28}{100}$ invested in the name of his said son. And finally, the said master ought further to have certified that it appears, by the affidavits of the defendant, that there is a large amount of property belonging to him which he has not surrendered.

The complainant further excepts to the inquiry as to the past or present mode and habits of defendant's living, or into the condition of his affairs, as wholly irrelevant to the matter of the said contempt.

In all which particulars the report of the said master is, as the complainant is advised, erroneous; and the said complainant appeals therefrom to the judgment of this honorable court.

F. PERIN,
*Solicitor for Compl't.*

November Term, 1858.

New Orleans, Saturday, 26th February, 1859.

Court met pursuant to adjournment. Present, Hon. Theo. H. McCaleb, district judge; absent, Hon. J. A. Campbell, presiding judge.

MARY B. PENROSE
vs. } 2,044.
JOSEPH *G.* WILKINSON.

The rule herein taken by the defendant on the 24th inst. having been assigned for trial for this day, came on to be heard, and was taken up for trial, in conjunction with the exceptions filed by the complainant to the master's report, and was argued by J. Ad. Rozier, esq., of counsel for the defendant, and proceeded with until three o'clock p. m., and thereupon it was ordered that the same be continued until Monday next; and it appearing to the court, from statements made in its presence, and in that of the counsel of the parties, that the said defendant is confined to his bed by illness, it is ordered that the deputy marshal having him in custody be withdrawn until the further order of the court.

*Minutes November Term, A. D.* 1858.

New Orleans, Wednesday, 2d March, 1859.

Court met pursuant to adjournment. Present, Hon. Theo. H. McCaleb, district judge; absent, Hon. J. A. Campbell, presiding judge.

MARY B. PENROSE
vs. } 2,044.
JOSEPH B. WILKINSON.

The trial of the exceptions to the master's report, and the rule in this cause, was resumed and argued by F. Perin, esq., for complainant, and by C. Roselius, esq., for the defendant, and was thereupon submitted to the court, and taken under advisement.

New Orleans, Friday, 4th March, 1859.

Court met pursuant to adjournment. Pesent, Hon. Theo. H. McCaleb, district judge; absent, Hon. J. A. Campbell, presiding judge.

MARY B. PENROSE
vs. }
JOS. B. WILKINSON.

The exceptions herein filed to the report of the master on the 24th Feb'y ult., together with the rule entered on the same day, having been heard and submitted, and the court having considered the same, doth now order, adjudge and decree that the said master's report be confirmed, and that the defendant, Joseph B. Wilkinson, be forthwith discharged from arrest and imprisonment, in which he has been held under process of attachment issued in this cause.

New Orleans, Wednesday, 9th March, 1859.

Court met pursuant to adjournment. Present, Hon. Theo. H. McCaleb, district judge; absent, Hon. J. A. Campbell, presiding judge.

MARY B. PENROSE
vs. } 2,044.
JOS. B. WILKINSON.

On motion of F. Perin, esq., solicitor for complainant, it is ordered that the defendant show cause on the 4th Monday of April next why the order herein rendered on the 4th instant, releasing the defendant from imprisonment, should not be set aside and discharged, and a rehearing be granted, on the grounds herein filed; and further, why an attachment should not issue to take him in custody as for contempt in disobeying the former decrees or orders of the court.

New Orleans, Saturday, 19th March, 1859.

Court met pursuant to adjournment. Present, Hon. Theo. H. McCaleb, district judge; absent, Hon. J. A. Campbell, presiding judge.

MARY B. PENROSE
vs. } 2,044.
JOS. B. WILKINSON.

On motion of J. Ad. Rozier, esq., of counsel for defendant, it is ordered that the application herein made by the complainant for a rehearing upon the exceptions to the master's report, &c., be assigned for trial for Thursday next, the 24th instant, at 10 o'clock a. m.

New Orleans, Thursday, 24th March, 1859.

Court met pursuant to adjournment. Present, Hon. Theo. H. McCaleb, district judge; absent, Hon. J. A. Campbell, presiding judge.

MARY B. PENROSE
vs. } 2,044.
JOS. B. WILKINSON.

The application herein made by the comp't having been assigned for argument for this day, was called up; whereupon the comp't, by her counsel, filed her written exceptions to the trial of the application; and the court took the subject under advisement.

*Objection to trying Rule.*—Filed 24th March, 1859.

Mary B. Penrose
vs.
J. B. Wilkinson.
} Circuit Court.

And now into this honorable court comes the complainant, by counsel, and asks leave to file this his objection to the trial of the rule taken on her behalf for a rehearing, and for cause alleges that the said rule for rehearing was fixed for the first day of the next term of the court, by the order and with the approval of the district judge, now sitting in this court, with the express view of having the aid of the presiding judge. And for further cause shows that the defendant is at large, and in no manner restrained or incommoded by any order of this court.

(Signed) F. PERIN,
*Solicitor for Compl't.*

*Minutes November Term*, 1859.

New Orleans, Wednesday, 20th April, 1859.

Court met pursuant to adjournment. Present, Hon. Theo. H. McCaleb, district judge; absent, Hon. J. A. Campbell, presiding judge.

Mary B. Penrose
vs.
Jos. B. Wilkinson.
} 2,044.

On motion of F. Perin, esq., of counsel for compl't, it is ordered that he have leave to withdraw his motion for a rehearing in case filed on 9th March, 1859, and to file, *tunc* pro tunc, in lieu thereof "a petition" for a rehearing.

*Petition for Rehearing.*—Filed with leave of Court, 20th Ap'l, 1859, nunc pro tunc, as of 9th March, 1859.

To the Honorable the Circuit Court of the United States for the fifth circuit and eastern district of Louisiana, in chancery sitting:

The petition of the complainant, in the matter of Mary B. Penrose vs. Joseph B. Wilkinson, respectfully shows, that on the 4th of March, 1859, a decree was rendered in this case by this honorable court, discharging the process of attachment heretofore issued in this case, and releasing the defendant from imprisonment; petitioner is dissatisfied with the said decree, and is advised there is error in the same, to the prejudice of your petitioner; for causes of which petitioner assigns:

1st. That the original final decree in the cause was founded upon the fraudulent conduct of the said defendant.

2d. It appears by the answers of the defendant, to interrogatories taken by special master, Lusher, that the said defendant put more than thirty thousand dollars' worth of property in the name of his son, with a verbal understanding to retake the same when required; and that the effect of such arrangement was to deprive complainant of her recourse on said property.

3d. It appears by said answers that defendant has not surrendered all his property for the purpose of satisfying complainant's claim, and that amount surrendered was not sufficient to pay the costs in this case.

4th. That the act of Jan'y 6th, 1800, does not apply to the case; and other causes to be stated on the hearing hereof.

Wherefore she prays that this petition be filed nunc pro tunc, as of the 9th of March, 1859; that a rehearing be granted, and the said decree of the 4th of March reversed, the attachment reinstated, and the defendant committed until he shall have satisfied the original decree, with costs, &c., and for general relief, &c.

F. PERIN,
*Solicitor.*

The undersigned, solicitors, certify that they conceive that the foregoing cause is proper to be reheard.

F. PERIN,
*Solicitor for Complainant.*

New Orleans, 20th Ap'l, 1859.

*Minutes November Term,* 1859.

New Orleans, Saturday, 23d April, 1859.

Court met pursuant to adjournment. Present, Hon. Theo. H. McCaleb, district judge; absent, Hon. J. A. Campbell, presiding judge.

MARY B. PENROSE
vs. } 2,044.
JOS. B. WILKINSON.

The court having duly considered the application herein made on part of the complainant on the 9th March last, and the petition presented for a rehearing, doth now order that the same be discharged.

Circuit Court of the United States, fifth circuit and eastern district of Louisiana.

CLERK'S OFFICE.

I hereby certify that the foregoing ninety-two (92) pages contain and form a full, complete, true, and perfect transcript of the record and proceedings in attachment had in the case of "Mary B. Penrose vs. Joseph B. Wilkinson," No. 2,044 of the docket of said court; also including copy of the opinion and final decree of the court rendered in said case.

Witness my hand, and the seal of said court, at New Orleans, this thirty-first (31st) day of October, A. D. 1859.

[SEAL.]

J. W. GURLEY, *Clerk*.
By W. LAVISSON, *Dep. Cl'k*.

Filed 1st Dec'r, 1859.

### *Reasons by Judge McCaleb against the issuance of a Mandamus.*

To the Honorable the Supreme Court of the United States:

Theodore H. McCaleb, one of the judges of the circuit court, in and for the fifth judicial circuit, holding sessions in and for the eastern district of Louisiana, now shows cause against the issuing of the writ of mandamus prayed for by Mary B. Penrose, and represents:

That on the 29th of January, 1859, a writ of attachment was issued by the clerk of said court, commanding the marshal to attach Joseph B. Wilkinson, so as to have him forthwith before said court, there to answer, touching a contempt of court alleged to have been committed.

On the 2d day of February a motion was made by the solicitors of Wilkinson, asking the court to order that the execution of said writ should be suspended, on the ground that the same could not be enforced without endangering his life, and based on the certificate of his physician.

The application was strenuously resisted by the solicitor of the complainant. Notwithstanding the hardship of the case, the defendant being bed-ridden, the court was of opinion that it could not interfere with the marshal in the execution of the writ.

Whereupon, on the next day, the solicitors of Wilkinson presented and filed a written statement, sworn to by Wilkinson, setting forth that, at the time of the execution of said writ, he had been confined for several weeks to his bed, by sickness of a serious character, and he was advised that it would be dangerous for him to leave his sick-room, representing his inability to make a personal appearance in court; otherwise he would have done so, for the purpose of purging himself of any alleged contempt of court; and, abiding the orders of the court, it was set forth that he had made a surrender of all his property to the marshal, and had made oath to all the matters required by the act of Congress, entitled "An act for the relief of persons imprisoned for debt," approved January 6th, 1800, sec. 2, and claiming the benefit of said act. On the same day his solicitors moved the court to refer said matter of the writ and charge of contempt to a master in chancery, to make an inquiry into the true state of the property and affairs of said Wilkinson. The motion was granted, and the master's report was filed on the 24th of February.

This report establishes that, at the time of the service of the writ, the defendant was physically unable to attend court, owing to sickness requiring his confinement to bed, and from which he had not recovered; that he had no other available means to satisfy the decree of the court than the property which he had surrendered to the marshal; and that he had taken the oath prescribed by the second section of the act of Congress approved January 6th, 1800, entitled "An act for the relief of persons imprisoned for debt."

Exceptions were filed to the report. Every opportunity was offered the complainant to produce testimony, if any she had, tending to contradict the sworn statements of the defendant relative to the true state of his affairs. She offered no evidence before the master in chancery, but merely propounded searching questions to the defendant, relative to his affairs and previous business transactions, running back several years. These interrogatories were promptly and satisfactorily answered. The exceptions to the report could not be maintained.

One of the sons of the defendant, it appears, had purchased real estate in the State of Louisiana. The defendant had furnished him with funds, enabling him in part to make the purchases; but the son assumed heavy incumbrances thereon, which still existed. These transactions between them do not appear to have been made with any intent to hinder or delay their creditors. There was no concealment on the part of the defendant, for he furnished to the marshal a full description of the property purchased as aforesaid.

The complainant alleges that the defendant created an apparent lien, by the acknowledgment of a judgment in favor of Payne and Harrison, when he was entitled to a release by paying a less sum. This charge is not sustained by anything contained in the answers of the defendant, or any proof. The judgment is not stated to have been confessed by the defendant. The amount for which the judgment was confessed was due at the time, and was subsequently nearly entirely paid. This is the conclusion the court arrived at.

It is proper to be observed that the defendant sold in Missouri real property there situated, and which had been conveyed to defendant by the complainant, (the rescision of which sale was asked for in this chancery suit,) and received the sum of $96,866.

The defendant has made a full statement of the disposition made of these funds, and of the losses sustained by him. The losses consisted in depreciation of property, fall of rents, &c. In making the sales, he had no intention of avoiding the payment of the money due the complainant.

The court was of opinion, that the defendant had made a full and honest surrender of all his property, and had made use of no contrivance or device whereby the complainant was to be in any way prejudiced, directly or indirectly; and that he was unable to comply with the decree of the court owing solely to inability and errors of judgment. Under these circumstances, was the defendant to remain in perpetual imprisonment?

In the first place, the decree only condemns the defendant to pay a sum of money. The complainant, it is true, contends that the defendant was held guilty of fraud in disposing of the real estate in Missouri, without having executed a mortgage in her favor, to secure the payment of the purchase money, in accordance with a promise previously made.

By reference to the opinion of the court, it will be seen that Goode was at the time the attorney of Wilkinson, and that, notwithstanding he had a letter authorizing him to execute the mortgage, he did not consider himself bound to do so. The omission was declared to be a breach of duty to the plaintiff, on the part of both Goode and Wilkinson, and by reason of which she was declared to be entitled to redress; and this failure entitled her to demand an immediate payment of the purchase-money, and interest was allowed from the date of the defendant's sales.

This was the penalty attached to this breach of duty. In the decree no reference is made to this—the decree is a mere money judgment. The defendant was not guilty of an actual contempt of court.

The decree was not for the specific performance of any act. According to the 8th rule, ("Rules of Practice for the Court of Equity,") the process to be issued was an execution.

In the State of Louisiana, by statute of March 28th, 1840, the writ of capias ad satisfaciendum was abolished.

By reference to the acts of Congress, it will be seen that the first act abolishes imprisonment for debt, under process of the courts of the United States, in any State where imprisonment for debt has been abolished, &c.; and the second act declares that the former shall be so construed as to abolish imprisonment for debt, in process issuing out of any court of the United States, in all cases whatever, where, by the laws of the State in which the said court shall be held, imprisonment for debt has been and shall hereafter be abolished. This language includes process issued from a court of chancery. For private debtors Congress wisely left them to the policy of their respective States. Moan vs. Wilmarth, 3 Wood and Mur., 400.

The eighth chancery rule provides for the performance of a specific act, and in authorizing a writ of attachment, an actual contempt of court is punished. The decree under consideration orders no specific act to be done. The maintenance of the writ of attachment in this case would be tantamount to the issuing of a writ of capias ad satisfaciendum. Besides, the defendant has complied with the act of Congress approved January 6th, 1800, section 2d. This act provides amply for the detection of fraud. The master in chancery officiated in a double capacity, as master and as commissioner, and had all the means necessary for the inquiry into and discovery of the true state of the debtor's property, transactions, and affairs.

This relief is extended to all persons imprisoned on process of execution, issuing from any court of the United States.

In the Bank of the United States vs. Weisiger, 2 Peters, 351, this court says, with respect to this act, "It is obvious that the confinement is not regarded as a means of coercion, but only as a time necessary to the investigation of the defendant's circumstances, or the collection of evidence, to repel his insolvency.

"The coercive means are to be found in the searching oath to be administered, and in the fear of prosecution for perjury and recommitment in the same actions."

The defendant is not guilty of an actual contempt of court, in the meaning of the act of March 2d, 1831.

The opinion of the Vice Chancellor in Vanwezel vs. Vanwezel, 3 Paige, (Ch. N. Y.,) p. 42, contains a full exposition of the state of the English laws on the subject now under consideration. The act of 1809, George 3, ch. 6, extends relief to prisoners in custody for contempt of court by not paying money ordered to be paid under decrees or orders of courts of equity, and affords to them the benefit of the insolvent laws. The act of Congress of 1800 and these acts of Parliament are couched in the same words: "imprisoned by virtue of one or more executions in civil causes." The statutes of New York are the same. Under these statutes the defendant, who is condemned to pay money by virtue of a decree in equity, has a right to apply for the benefit of the insolvent laws, and obtain his release. Otherwise, where he is committed for the non-performance of some act or duty which it is in his power to perform. In Rex vs. Sokes, (Cowp., 136,) the court considered an attachment to be an execution, in a civil cause, so far as it was intended to enforce an obligation, or the performance of a duty, as between party and party, and as a matter solely between them, unconnected with the offence itself; it was of a civil nature. See also 1 Term R., 316.

In South Carolina, in Lowe vs. Blake, 3 Dep., 269, the same doctrine is held. The attachment not being for an actual contempt of court, but for the non-payment of money, under the decree, which is analogous to the execution, the discharge under the insolvent debtors' act, if properly obtained, would discharge such attachment.

A certificate of bankruptcy discharges an attachment for the non-payment of a sum of money. Wall vs. Atkinson, Coop., 198; Smith's Ch. P., vol. 1, p. 431; Paige, Ch. R., vol. 8, p. 9; Moan vs. Wilmarth, Wood & Mur., vol. 3, p. 399.

The Louisiana statutes, referred to by the complainant, act of March, 1840, and acts of 1855, have no application to the case at bar. These statutes provide for the punishment of fraudulent debtors; a jury is summoned for the purpose of deciding on the accusation of fraud. Besides, the defendant is not shown to be guilty of any of the acts specified in said acts, and constitution of frauds in the eye of the law. The reading of the 24th section of the law of 1855 (Phillips's Digest of Louisiana Statutes) clearly shows it.

On the 9th of March the complainant made a motion for a re-hearing, and made it returnable on the 4th Monday of April. This motion was withdrawn, for, on the 20th of April, a petition for re-hearing was filed with the leave of the court, the complainant having become aware that she had not complied with the 88th rule, requiring a petition. According to this rule, no re-hearing shall be granted after the term at which the final decree (in this case the interlocutory judgment) shall have been entered and recorded. The complainant had no right to ask for a re-hearing, to be disposed of at a succeeding term.

Besides, the solicitors of the defendant justly represented to the court the hardship of the case, the urgency of speedy action; they insisted on the strict observance of the rule. The court had no doubt of the correctness of the interlocutory judgment, and justice required that the re-hearing should be refused at the same term.

The court could not sanction such practice.

The complainant has a right of appeal from the interlocutory judgment, and it is to be hoped that she may exercise it, in order that if the inferior court has committed an error it may be corrected.

Respectfully submitted.

THEO. H. McCALEB,
*U. S. Judge.*

Filed 13 Jan., 1860.

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